TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~679~~. 610 ~~327~~ 52

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, AND JOHN S. STORRS, PARTNERS AS J. TEAL AND COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN S. BILBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 29, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 970.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, AND JOHN S. STORRS, PARTNERS AS J. TEAL AND COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN S. BILBY.

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1 UNITED STATES OF AMERICA, *sct.:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, copartners, trading and doing business under the firm name of J. Teal & Co., and John S. Bilby, a manifest error hath happened, to the great damage of the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, D. C., together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office in Kansas City, this eighteenth day of June, A. D. 1884.

[SEAL.] H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

App'd.
A. KREKEL, *Judge.*

1½ WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct.:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court. Issued at office in Kansas City, this 25th day of July, A. D. 1884.

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *Deputy Clerk.*

[Endorsed:] 405. United States circuit court, western district of Missouri, western division. Joseph Teal *et al. vs.* John S. Bilby. Writ of error. Filed J— —, 18—. ———,clerk.

2 The United States of America to John S. Bilby, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington city, D. C., on the second Monday of October next, pursuant to a writ of

error, filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the western division of the western district of Missouri, this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

A. KREKEL, *Judge.*

2½ UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, Western Division, }

M. T. C. Williams, being duly sworn, says: That he served the within citation, this 19 day of June, A. D. 1884, by delivering a true copy thereof to William Warner and O. H. Dean, attorneys for defendant in error, at Kansas City, Missouri, in said district.

M. T. C. WILLIAMS.

Subscribed and sworn to before me, this 19th day of June, 1884.

WARREN WATSON,
Com'r U. S. Circuit Court, Western District of Mo.

[Endorsed:] 409. United States circuit court, western district of Missouri, western division. Joseph Teal *et als. vs.* John S. Bilby. Citation. Filed June 18th, 1884. H. C. Geisberg, clerk.

3 UNITED STATES OF AMERICA, *sct.:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in the case of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, (copartners, trading and doing business under the firm name of J. Teal & Co.,) plaintiffs, against John S. Bilby, defendant. At law.

Be it remembered that, heretofore, to wit, on the 23rd day of December, A. D. 1881, in vacation of said court, a petition was filed in the above-entitled cause, in the clerk's office, as follows, to wit:

In the Circuit Court of the United States of America for the Western Division of the Western District of Missouri, for the May Term A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN S. STORRS, Copartners, trading and doing business under the firm name of J. TEAL & Co., Plaintiffs,

against

JOHN S. BILBY, Defendant.

The plaintiffs, Joseph Teal, Henry Coleman, John Y. Todd, and

John S. Storrs, state, at the dates hereinafter mentioned, they were and still are copartners, trading and doing business under
4 the firm name of J. Teal & Co.; that on said dates, hereinafter stated, they and each of them were, and still are, citizens of the State of Oregon, and that the defendant, John S. Bilby, was, and now is, a citizen of the western division of the western district of Missouri.

Plaintiffs further state that on the third day of November, 1880, they were the owners of fifteen hundred head of cattle, and were then in possession of the same; that, being desirous of having said cattle properly fed and cared for during the winter, spring, and summer following, and fattened and prepared in the following fall for market, on the said last named day at Council Bluffs, Iowa, they, under the firm name of Joseph Teal and Co., and the said defendant, John S. Bilby, entered into their certain contract in writing, of that date, concerning said cattle, which said contract is in words and figures as follows, that is to say:

"This contract, entered on this day, November 3d, 1880, by and between J. Teal & Co., of Portland, Multnomah county, Oregon, of the first part, and John S. Bilby, of Fairview, Nodaway county, Missouri, of the second part, is as follows: J. Teal & Co. to weigh fifteen hundred (1500) cattle at the Transfer Stock Yards, Council Bluffs, Iowa, after feeding, watering, and then shrinking twelve hours, to be delivered to John S. Bilby, at Dawsonville, Missouri, said cattle to be fed, watered, weighed, and handled, by Rosenbaum, Bass & Co., Transfer Stock Yards, Council Bluffs, Iowa. The cattle to be delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Wasco county, Oregon, to Rock Creek, Wyoming Territory, branded with "T" on the left side, similar in age, flesh, and quality to a train-load that arrived at Council Bluffs, Iowa, on Sunday, October the 17th, 1880, Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train-load which arrived on Sunday, October 17th, 1880. If any train cattle shall arrive prior to twelve o'clock m., they shall be taken off feed and water the same evening of the day of arrival at seven o'clock p. m. If they shall arrive after twelve o'clock m., they shall be shut off of feed and water at seven o'clock p. m. of the following day. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw, and stock fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales to any feed lot where each bunch of cattle may feed, after a twelve hours' shrink; such shrink to be within the same hours as when the cattle were first weighed and delivered. Cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard,

they shall come and make selections of such cattle as they wish to cut out, from two to five days prior to the day of weighing. Said cattle to be weighed and delivered in lots of from one hundred and seventy-five (175) to two hundred and twenty-]
5 five (225), between the fifteenth day of October, 1881, and the first day of December, 1881, by giving ten days' notice, either by telegram, letter, or in person, at the option of J. Teal & Co., J. Teal & Co. agreeing to pay five cents per pound for all increase of weights from time of weighing to Bilby to time of reweighing back to J. Teal & Co. They further agree to advance one thousand (1,000) dollars to John S. Bilby on the 1st day of September, 1881, to be applied to payment of weights added to cattle on last delivery, John S. Bilby to be responsible for all cattle lost, strayed, or stolen, and for any dying through the neglect or carelessness of the said John S. Bilby; any dying through causes unavoidable shall be shared thus: J. Teal & Co. to bear the loss of the steers, and John S. Bilby the feed. If any steers die, John S. Bilby shall preserve the hide as evidence of death, and the ears, if there are any ear-marks. It is further agreed that if the said John F. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said money and the amount to be paid on delivery of cattle to said J. Teal & Co. The said John S. Bilby agrees that if said cattle remain in his possession until December 1st, 1881, that he shall so feed and care for them that will increase in weight four hundred and fifty (450) pounds each on an average.

"JOSEPH TEAL & CO.
"JOHN S. BILBY.

"JOHN N. BALDWIN, *Witness.*"

6 Plaintiffs aver that in pursuance of said contract, and within the two days next following the execution thereof, they caused to be weighed and delivered to said defendant the said fifteen hundred head of cattle mentioned and specified in said contract, which said cattle were of the kind, character, and quality specified and agreed upon in said contract, and that the said defendant, John S. Bilby, then and there accepted and received from the plaintiffs under said contract the said fifteen hundred head of cattle so weighed and delivered to defendant by plaintiffs as aforesaid.

Plaintiffs state that at the time said cattle were weighed and delivered to defendant as aforesaid, their average weight was nine hundred and fifty pounds per head.

Plaintiffs further state that thereafter, to wit, on the 1st day of September, 1881, in pursuance of said contract, they advanced to defendant the sum of one thousand dollars, and that plaintiffs have in all things kept and observed all the terms and conditions of their said contract, and that they did allow and permit said cattle to remain with said defendant and under his care and control, under said contract, until the first day of December, 1881.

Plaintiffs further state that if said cattle had been well wintered on hay, straw, and stalks until grass came in the following spring,

and kept in enclosed pastures on good grass during the spring and summer following, until August 15th, 1881, and from said last-named day fed all the corn said cattle would have eaten on each and every day until the first day of December, 1881, said cattle would
7 have increased in weight, on an average, four hundred and fifty pounds per head; and plaintiffs say that said defendant, in and by his said contract, did undertake and agree that if said cattle were allowed to remain with him and in his possession under said contract until the first day of December, 1881, he would so feed and care for them that they would increase in weight, upon an average, four hundred and fifty pounds per head.

Plaintiffs aver that, that if said cattle had been so fed and cared for by defendant, and increased in weight four hundred and fifty pounds per head, as aforesaid, said cattle, on the 1st day of December, 1881, would have been worth to the plaintiffs the sum of ninety-eight dollars per head.

Yet plaintiffs state that the defendant did not keep, perform, and observe the said contract on his part, in this, that said defendant neglected and failed to feed said cattle sufficient hay, straw, and stalks to winter the said cattle, as in and by his said contract he was to do; that he failed, neglected, and refused to keep said cattle in enclosed pastures or on good grass from the time grass came in the spring of 1881 until the 15th day of August, 1881; and that he failed, neglected, and refused to feed said cattle from and after the said 15th day of August, 1881, from day to day, until the first day of December, 1881, all the corn they would eat, or to sufficiently or adequately feed said cattle between the two dates last aforesaid, as by said contract defendant was bound to do; and that said defendant failed, refused, and neglected to so feed and care for said
8 cattle while the same remained in his possession under said contract, as to increase the weight of said cattle upon an average of four hundred and fifty pounds per head, as by the terms of said contract he had agreed to do.

And plaintiffs further aver that the said defendant, on the first day of December, 1881, refused to turn over to plaintiffs, though then requested so to do, any of the said cattle, and that plaintiffs were compelled to and did sue out of this court a writ of replevin therefor, and that on the 6th day of December, 1881, plaintiffs took from the possession of the said defendant, by the said writ, twelve hundred and twenty-nine head of said cattle and no more.

Plaintiffs state that the increase in the average weight of said cattle so taken from defendant upon said writ as aforesaid was three hundred and twenty-six pounds per head and no more, and that defendant had so neglected, fed, and cared for said cattle so taken on said writ as aforesaid, that on the said first day of December, 1881, said cattle so taken upon said writ were not in good marketable condition, and were then and there not worth more than forty-four dollars per dead.

Plaintiffs further say that they were unable to and did not obtain or take from said defendant by the said writ of replevin, and that said defendant has hitherto failed, neglected and refused to deliver,

and still refuses to deliver, to plaintiffs, although often requested so to do, two hundred and seventy-one head of the said fifteen hundred head of cattle so entrusted to his care by and through said contract as aforesaid, whereby said two hundred and seventy-one head of cattle were wholly lost to plaintiffs, and that said two
9 hundred and seventy-one head of cattle were reasonably worth twenty-six thousand dollars.

By all of which said acts and doings of said defendant plaintiffs have been injured and damaged in the sum of ninety-two thousand three hundred and sixty-six dollars, for which said sum with interest and costs plaintiffs ask judgment.

L. H. WATERS,
WOODSON & CROSBY,
EDWARDS & RAMSEY,
Att'ys for Pl'ffs.

And upon the filing of said petition a writ of summons was issued in words and figures as follows, to wit:

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States of America to the Marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon John S. Bilby, a citizen of the State of Missouri, and the western division of the western district thereof, to be and appear before the honorable circuit court of the United States in and for the western division of the western district of Missouri, on the first day of the next term thereof, to be begun and holden at the city of Kansas, in the said district, on the third Monday, the 15th day of May next, then and there to answer the complaint of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, copartners trading and doing business under the firm name of J. Teal & Co., citizens of the State of Oregon, as set forth in the petition filed in the office of the clerk of said court, on the
10 23rd day of December, A. D. one thousand eight hundred and eighty-one.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 24th day of December, A. D. eighteen hundred and eighty-one.

Issued at office in the city of Kansas, in said district, under the seal of said circuit court, the day and year last aforesaid.

H. C. GEISBERG,
Clerk of said Court.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *ss:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the western district of Missouri, do hereby certify that the foregoing is a true copy of the writ of summons issued on the 24th day of December, A. D 1881, in case (No. 405) of J. Teal & Co. *et al.*

against John S. Bilby, as fully as the same remains on file in said case in this office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of Kansas, in said district, this 24th day of December, A. D. 1881.

[SEAL.] H. C. GEISBERG, *Clerk.*

11 Which said writ of summons was afterwards returned into said court with the marshal's return of service endorsed thereon as follows, to wit:

I hereby certify that I executed this writ by delivering by mistake the original writ of which this is a certified copy, together with a certified copy of the petition filed in the case to John S. Bilby, the within-named defendant. Done in the western division, western district of Missouri on the 20th day of December, 1881.

C. C. ALLEN, *U. S. Marshal,*
By R. M. ELLIOTT, *Deputy.*

Afterwards at the regular May term, 1882, of said court, and on the 15th day of May, A. D. 1882, the following entry appears of record, to wit:

JOSEPH TEAL *against* JOHN S. BILBY.

By consent and leave defendant takes till Saturday to plead.

Afterwards at the regular May term, 1882, of said court and on the 22nd day of May, A. D. 1882, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day comes defendant by his attorney, and files answer. Which said answer is in words and figures as follows, to wit:

12 In the Circuit Court of the United States of America for the Western Division of the Western District of Missouri, at May Term, A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN JOHN Y. TODD, and JOHN S. STORRS, copartners trading and doing business under the firm name of J. Teal & Co., Plaintiffs,

vs.

JOHN S. BILBY, Defendant.

Comes now John S. Bilby, the defendant in the above-entitled cause, and for answer to the plaintiffs' petition denies each and every, all and singular, the allegations in the said plaintiffs' petition contained, not herein expressly admitted. Defendant admits that the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs are copartners; that the said Joseph Teal, Henry Coleman, John Y. Todd, John S. Storrs are each and all citizens of the State of Oregon, and that the defendant herein is a citizen of the western division of the western district of the State of Missouri.

The defendant, further answering, declares the facts to be as follows: That on the third day of November, A. D. 1880, Joseph Teal & Co., a firm composed of said named plaintiffs, entered into a certain written contract with said defendant concerning the feeding and care of fifteen hundred head of cattle, which are the same cattle described in plaintiffs' petition, which said contract is the
13 same contract that is set forth in plaintiffs' petition.

The defendant further states that by the terms of said contract the fifteen hundred head of cattle to be received by the defendant were to be similar in age, flesh, and quality to a train load of cattle that arrived at Council Bluffs, Iowa, on Sunday, October 17th, 1880; that the Rosenbaum, Bass & Co. named in said contract were the cattle commission men and agents of the plaintiffs' firm, J. Teal & Co., at Council Bluffs, Iowa, to receive, handle, and dispose of plaintiffs' cattle; that on the 17th day of October, 1880, a certain train load of cattle had been received at Council Bluffs, Iowa, which cattle had been seen and examined by said Bass, of said firm of Rosenbaum, Bass & Co., which fact was at the time of the execution of said contract known to the defendant herein, and the defendant, relying on the statements of the plaintiffs, J. Teal & Co., as to the quality of said cattle, and the plaintiffs' representations as to the knowledge and judgment of said Bass, was induced to enter into said contract, whereby said Bass was to be the judge of the cattle arriving, whether or not they were an average lot with the train load which arrived on Sunday, October 17th, 1880, at Council Bluffs, Iowa; that upon the arrival of said fifteen hundred head of cattle at Council Bluffs, Iowa, the plaintiffs, J. Teal & Co., represented the same to be in all respects equal to the said train load of cattle which had arrived at Council Bluffs as aforesaid on said Sunday, October the 17th, 1880, and said Bass represented said cattle to be an average lot with the train load which had arrived on Sunday, October the 17th, 1880, at Council Bluffs, Iowa; that
14 the —— Creek, Wyoming Territory, branded with "T" on the left side, similar in age, flesh, and quality to a train load that arrived at Council Bluffs, Iowa, on Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train which arrived on Sunday, October 17th, 1880.

If any train of cattle shall arrive prior to twelve o'clock m. they shall be taken off, fed and watered the same evening of the day of arrival at seven o'clock p. m. If they shall arrive after twelve o'clock m. they shall be shut off of feed and water at seven o'clock p. m. of the following day. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw, and stalk-fields until grass comes; to be kept in enclosed pasture on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales, to any feed lot where each bunch of cattle may feed after a twelve-hours' shrink, such shrink to be within the same hours as when the cattle were

first weighed and delivered; cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard they shall come and make selections of such cattle as they wish cut out from two to five days prior to the day of weighing, said cattle to be weighed and delivered in lots of from one hundred and seventy-five (175) to two hundred
15 and twenty, defendant then and there relying on the representations of the plaintiffs, and believing the same to be true, not knowing that said Mr. Bass was in any manner deceived, but was in possession of all the knowledge and the full facts necessary to form a proper judgment concerning said cattle, accepted and received the same to the number aforesaid. Defendant alleges that the said fifteen hundred head of cattle were not as represented by the plaintiffs, J. Teal & Co.; that they were not an average lot with the train load which arrived on Sunday, October the 17th, 1880, at Council Bluffs, Iowa; that said cattle were the greater part of a herd that had been snowed in and detained at or in the vicinity of Rock Creek, in Wyoming Territory, from and after said 17th day of October, 1880, until the 30th day of November following; that the said cattle had during all of said time been exposed to severe storms and cold weather, and starved without either food or water until many of them perished; that they were loaded on cars at or near Rock Creek aforesaid, and still further exposed to the inclemency of the weather, and being still without food or water, and shipped to Council Bluffs, Iowa, that many died on the road from starvation and exposure; that the plaintiffs, J. Teal & Co., to further deceive and impose on the said Bass and this defendant, caused the cars on which said cattle were loaded to be stopped before reaching said stock yards at Council Bluffs, and the dead cattle removed therefrom; that after said 17th day of October, 1880, and before said cattle reached Council Bluffs, Iowa, many of them were so badly frozen and injured thereby
16 that the flesh afterwards came off of said cattle in pieces, and said cattle were so frozen and injured that they never did fully recover therefrom and the effects of the same; that many of the said cattle were in a dying condition when they were received by the defendant, of all which facts the defendant and said Bass were ignorant at the time; but that all of said facts were well known to said J. Teal & Co., but were by them entirely concealed for the purpose of deceiving and imposing on said Bass, and deceiving and defrauding the defendant, plaintiffs well knowing that said Bass was judging of said cattle, and the defendant receiving the same, wholly ignorant of the fact that said cattle had been frozen, mistreated, and abused as aforesaid and of their real condition; that by reason of said abuse, mistreatment, and freezing said cattle were less able to endure the following winter after their delivery to the defendant, and many of said cattle died before they could recuperate from the injurious effects produced as aforesaid; that the defendant, after the receipt of the said cattle, caused them to be reloaded on cars at said Council Bluffs, Iowa, and as soon thereafter as possible shipped them to Dawsonville, Missouri, the nearest railroad station to Fairview, Nodaway county, Missouri, the place at or near which

said cattle were to be kept; that when said cattle were unloaded at Dawsonville, Missouri, many of them were so weak, sick, sore, and lame from the treatment and exposure aforesaid that twenty-five head of said cattle were unable to travel from said station to defendant's farms, at and in the vicinity of Fairview aforesaid, but fell down and died on the way thither, although handled and
17 driven with great care by the defendant, and that within thirty days thereafter one hundred and seventy-five more of said cattle died from the said cause, namely, the mistreatment, freezing, and starving aforesaid; that many of said cattle languished and lingered through the winter, but never recovered from the effects of the treatment and injuries aforesaid; that afterwards, at different periods, seventy other head of said cattle died of disease produced by the treatment—freezing and exposure aforesaid, or in consequence of their enfeebled condition occasioned thereby; that none of said cattle were lost, strayed, or stolen, and none died through the neglect or carelessness of the defendant; that all of said cattle thus accounted for were lost and died through causes unavoidable on the part of said defendant.

Defendant further avers that in pursuance with the terms of said contract he did preserve the hides of such steers as died, and the ears of such steers as died having ear marks, except a few which died on the river bank and by the rising of the river, were covered by the water and subsequently frozen in the ice, which fact was reported to and otherwise well known to plaintiffs, and the death of said cattle, and their identity as being part of the said fifteen hundred admitted by plaintiffs, and the cutting of the same out of the ice, in which they were thus frozen, was expressly waived by plaintiffs, at the time defendant proposed and undertook to cut the same from the ice to preserve the hides and ears, if the same had any ear marks, pursuant to the said contract; that the said plaintiffs afterwards agreed to and *and* with defendant upon a definite time
18 when they would receive the said hides and ears having ear marks, preserved from the cattle dying as aforesaid, and that pursuant to such agreement the defendant tendered to plaintiffs the hides of the cattle dying as aforesaid, and the ears having ear marks, but notwithstanding the agreement by the plaintiff as aforesaid they refused to accept the same as proof of death of said cattle as stipulated by said contract, since which time said hides have spoiled and rotted either wholly or in part.

Defendant further states that under and in pursuance of said contract he paid and advanced to the Wabash, St. Louis and Pacific Railway Company, on account of plaintiff, for the transportation and freight of said cattle from Council Bluffs, Iowa, to Dawsonville, Missouri, large sums of money, to wit: On the 4th day of November, 1880, seven hundred and forty-two and $\frac{50}{100}$ dollars; on the 5th day of November, 1880, two hundred and forty-seven and $\frac{50}{100}$ dollars; on the 7th day of November, 1880, one hundred and sixty-five dollars, which and the interest thereon at the rate of ten per cent. per annum from the date of the payments as aforesaid, as stipulated in said written contract, are still due the defendant.

That on or about the 15th day of December, 1880, it appearing to the plaintiffs and defendant herein, and being so agreed between them, that by reason of the sorry condition to which said cattle had been reduced (notwithstanding the subsequent care and caution of the defendant) by the abuse, starving, and freezing of the same and their consequently greatly reduced condition of flesh
19 and vitality, that said cattle could not be wintered on hay, straw, and stalk-fields, it was agreed by and between the said plaintiff and the defendant that the written contract should be abandoned in this regard, and the same was modified, by oral agreement, to the effect and extent that the defendant should put said cattle on corn at that time, and so continue feeding them corn until they had sufficiently recovered from the injuries aforesaid received, as aforesaid, and had become by such feed sufficiently built up so that thereafter those that might survive could be fed on hay, straw, and cornstalks, as had been provided in the contract that they should be fed in the first instance; and it was also agreed at the same time that the time defendant should so feed said cattle corn in the winter of 1880 and 1881 should be deducted and taken from the time he should retain them in his custody and feed them on corn during the summer and fall of 1881 originally provided for in said contract; and it was further agreed between plaintiffs and defendant at the last said date that because and on account of the condition of the cattle as aforesaid, produced by the causes aforesaid, and in consideration of the defendant agreeing to continue to execute his part of said contract, modified as aforesaid, the plaintiffs should and did waive any and all rights they had under the original agreement to require the defendant to so feed and care for said cattle that they would increase in weight four hundred and fifty pounds each on an average, and all claims, if any, they otherwise had against the defendant because of his failure to increase the average weight of
20 said cattle to the amount aforesaid; and it was at the same time agreed that the plaintiff should pay the defendant for the increased average weight of such cattle as might survive in excess of the weight thereof at the time they were delivered to him as aforesaid, the price in the contract stipulated that he should receive per pound for the increased weight; that in pursuance of said contract, modified and changed as aforesaid, the defendant did feed said cattle on corn, all they would eat, from and after the 15th day of December, 1880, to the first day of March, 1881, a period of seventy-five days, on each and every day of which time said cattle were fed all the corn they would eat, of all of which the plaintiffs had full knowledge at the time; that on the 27th day of September, 1881, the defendant notified the plaintiffs that their cattle were ready for delivery to them.

Defendant states that the time for the delivery of said cattle by him to the plaintiffs, and the time when they should receive the same from him under the contract modified and changed as aforesaid, was the 15th day of September, 1881, of which fact the plaintiffs had full knowledge; but the plaintiffs neglected and refused from time to time thereafter to take said cattle, although the same

were at all times after the last said date ready for delivery to plaintiffs, as they well knew; that on the 28th day of October, 1881, the defendant sought the plaintiffs and found them in the State of Iowa, and notified them in writing that said cattle were ready for delivery upon payment of the amount due defendant therein, and for his care of the same, and his other charges against them for freights advanced thereon as aforesaid; that the defendant then, on November
21 the 1st and 2nd, 1881, caused said cattle to be weighed and the total weight thereof was one million five hundred and fifty-three thousand three hundred and five pounds. That plaintiffs neglected and refused to receive said cattle or to notify the defendant when they would receive the same, until the 15th day of November, 1881, when the defendant received a notice in words and figure as follows, to wit:

To JOHN S. BILBY:

You are hereby notified that we will be ready to receive from you on the 1st day of December, 1881, the cattle consisting of fifteen hundred head of steers belonging to us and placed in your keeping under a written contract, dated November 3d, 1880, and we hereby notify you that on said 1st day of December, 1881, we will demand said fifteen hundred head of steers at your hands.

November 15th, 1881. TEAL & CO.

That the defendant did make arrangement to weigh and deliver said cattle to the plaintiffs at the time stated in their said notice; that on the 9th of November, 30th, and also on the night following, when said cattle were lotted for weighing, the said plaintiffs, with intent to injure the defendant and make it appear that said cattle were lighter than they in fact were, did annoy, disturb, and frighten them and thereby caused them to fall off greatly in weight, and shrink in weight on an average of fifteen pounds per head, to the damage of this defendant in the sum of two thousand two hundred and forty-five dollars.

That the defendant did have said cattle, to wit, twelve hundred and thirty-two head, at Dawsonville, Missouri, on the 2nd day
22 of December, 1881, and was then and there ready and willing to deliver the same to the plaintiffs, J. Teal & Co., upon the said J. Neal & Co. paying unto the defendant the sum justly due him for feeding and caring for said cattle and for the money advanced for freight on the same as aforesaid in the transportation of said cattle from Council Bluffs, Iowa, to said Dawsonville, Missouri, and for the damage caused and accruing to defendant by reason of the frightening, annoying, running, and injuring said cattle as aforesaid, to wit, the sum of twenty-nine thousand one hundred and thirty-six and $\frac{62}{100}$ dollars.

Defendant further avers that, notwithstanding plaintiffs' notice in writing aforesaid, being dated November 15th, 1881, wherein plaintiffs pretend and stated that they would receive said cattle on December 1st, 1881, and in consequence of their said statement so made the defendant drove said cattle to Dawsonville, Missouri, as

soon thereafter as he could do so and conform to the time stated in said notice, and did have said cattle at said place, then the plaintiffs absolutely refused to receive them and pay the defendant for his interest therein accruing as aforesaid or any part thereof, but, on the contrary, sought to get possession of said cattle without paying the defendant anything whatever for his care bestowed thereon, or feed furnished by him to them, or freight paid thereon as aforesaid, or the injury done to said cattle by frightening and disturbing them as aforesaid, whereby said cattle was kept confined in lots and pens at Dawsonville aforesaid from December the 2nd, 1881,
23 until December 9th, 1881, at which last date said cattle were taken from the defendant by the action in replevin commenced in this court by plaintiffs against the defendant for the recovery by them of the possesssion of said property.

That during the said period of time that said cattle were kept by defendant at Dawsonville aforesaid the defendant bestowed care continuously upon them and fed them, and that the value of the feed and care so bestowed upon them was the sum of one thousand dollars; that after the expiration of the contract as modified, as hereinbefore set forth, viz., in September, 1881, the said plaintiff refusing to receive or take away the said cattle as aforesaid, the defendant, between that date and December 1st, 1881, fed the said cattle thirty-seven thousand and two hundred bushels of corn, of the value of fifty cents per bushel, and during the same time bestowed care and labor upon the said cattle amounting to the sum of one thousand dollars.

Wherefore the defendant prays judgment for the sum of fifty-one thousand nine hundred and eighty-one dollars and sixty-two cents and costs.

JOHNSTON & ANTHONY,
WHITE & ALDERMAN,
TICHENOR, WARNER & DEAN.
Att'ys for Defendant.

24 Afterwards, at the regular May term, 1882, of said court, and on the 26th day of May, A. D. 1882, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day comes the plaintiff, by his attorneys, and files reply, which said reply is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, of the May Term, 1882.

JOSEPH TEAL *et al.*
against
JOHN S. BILBY. } No. 409.

The plaintiffs, for their reply to the answer of the defendant herein, deny each and every allegation therein contained.

EDWARDS & RAMSEY,
L. H. WATERS,
Pl'ffs Att'ys.

25 Afterwards at the regular October term, 1882, of said court, and on the 27th day of October, A. D. 1882, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day a stipulation is filed herein that the above cause shall not be called before the 11th day of December next.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 12th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL & Co. *against* JOHN S. BILBY.

This day comes the parties by their attorneys as in case (No. 405) between the same parties; and thereupon the court doth order that this case be consolidated with said case 405 for the purpose of the submission, and that the hearing hereof proceed before the jury now empanelled in case No. 405. Thereupon proceedings are had, and not being completed at the hour of adjournment, it is ordered that further hearing be postposed till to-morrow morning.

26 Afterwards at an adjourned day of the regular October term, 1882, of said court, and on the 13th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause; thereupon further proceedings are had, and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 14th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try the issues herein; thereupon further proceedings are had, and the hearing not having been completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

27 Afterwards, at an adjourned day of the regular October term, 1882, of the said court, and on the 15th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try the issues; thereupon further proceedings are had, and the proceedings not having been completed at the hour of adjourn-

ment, it is ordered that further proceedings be postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 16th of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys and the jury as on yesterday; thereupon further proceedings are had, and this cause not being completed at the hour of adjournment, further hearing is postponed till Monday morning next.

28 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 18th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause; thereupon further proceedings are had, and the hearing of evidence not being completed, it is ordered that further proceedings be postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 19th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause; thereupon further proceedings are had, and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

29 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 20th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, and the jury sworn to try this cause; thereupon further proceedings are had, and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 21st day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause; thereupon further proceedings are had, and further hearing postponed till to-morrow morning.

30 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 22d day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause, as on yesterday; and thereupon further proceedings are had, and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 23rd day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, as on yesterday, as well as the jury sworn to try this cause; and thereupon further proceedings are had, and the hearing not being completed at the hour of adjournment, further proceedings are postponed till Tuesday next.

31 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 26th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties, by their attorneys, and the jury sworn to try this cause; thereupon proceedings are had, and, not being completed at the hour of adjournment, it is ordered that further hearing be postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 27th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come again the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon further proceedings are had, and, not being completed at the hour of adjournment, further hearing is postponed till to-morrow morning.

32 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 28th day of December, A. D. 1882, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon further proceedings are had, and, not being completed at the hour of adjournment, further hearing is postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 29th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys, and the jury sworn to try this cause as on yesterday; and thereupon further proceedings are had, and the hearing not having been completed at the hour of adjournment, further proceedings are postponed till to-morrow morning.

33 Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 30th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys, and the jury sworn to try this cause; thereupon the issues herein are submitted on the argument of counsel, and further hearing is postponed till Tuesday morning next, when the charge of the court will be delivered.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 2nd day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties, by their attorneys, and the jury sworn to try this cause as on Saturday last; thereupon, after hearing the charge of the court, the jury retire to consider what verdict they shall render in the premises; and, after due consideration, the jury return into court the following verdict, to wit:

34 We, the jury, find the issues for the defendant.

W. W. RIGGS, *Foreman.*

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 3rd day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

In pursuance of the verdict returned into court by the jury on yesterday in the above cause, it is considered by the court that the defendant go hence without delay and recover of and from the

plaintiffs, Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, his costs herein expended, and have thereof execution.

Thereupon comes the plaintiffs, by their attorneys, and file motion for new trial herein.

Which said motion for new trial is in words and figures as follows, to wit:

In the U. S. Circuit Court, Western Division of the Western District of Missouri.

JOSEPH TEAL & Co. *against* JOHN S. BILBY. } No. 409.

35 Plaintiffs move the court to set aside the verdict and for a new trial, because:

(1.) The court erred in excluding competent and relevant testimony offered by plaintiffs.

(2.) The court erred in admitting incompetent and irrelevant testimony on behalf of defendant.

(3.) The verdict was against the law and evidence.

(4.) The court erred in charging the jury as to the law of the case.

(5.) Matters were submit-ed to the jury and pas-ed on by them which were not presented by the pleadings.

(6.) Under the pleadings and evidence the verdict should have been for plaintiffs.

L. H. WATERS,
EDWARDS & RAMSEY,
A. — P.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 25th day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL & Co. *against* JOHN S. BILBY.

This day come the parties, by counsel; and the motion for new trial coming on for hearing, the same is argued by counsel,
36 submitted to the court, and taken under advisement.

Afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 5th day of February, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys; and the motion for a new trial having been duly called for hearing, the same is argued by counsel and submitted; and thereupon, on consideration of the premises, the court doth deny the same. Leave till first Monday in April to file bill of exception is given plaintiffs.

Afterwards, at an adjourned day of the regular October term, 1882,

of said court, and on the 2nd day of April, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Come again said parties; and plaintiffs' counsel having prepared their bill of exceptions herein, and tendered the same ten days since to defendant's counsel for their examination, and defendant's
37 counsel desiring further time for that purpose, it is ordered by the court, by the consent of both parties, that the further consideration of said bill be, and the same is, postponed to the first day of the next term of this court.

Afterwards, at the regular May term, 1883, of said court, and on the 21st day of May, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Again come the parties to the above-entitled cause, by their respective counsel; and thereupon said plaintiffs again present their bill of exceptions herein, and pray the court to sign the same, and make them a part of the record herein. Whereupon defendant's counsel ask the court for further time to examine said bill, and on the application of defendant's counsel, and by consent of parties, it is ordered by the court that the further consideration of said bill of exceptions in said cause be, and the same is hereby, continued until June 18th, 1883.

Afterwards, at an adjourned day of the regular May term, 1883, of said court, and on the 30th day of June, A. D. 1883, the following entry appears of record in said cause, to wit:

38 JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys; whereupon defendant's objections to the bill of exceptions of plaintiffs are presented to the court, and the hearing thereof progressed; and, not being concluded at the hour of adjournment, the further hearing and consideration of the same is postponed until the first Monday in August next.

Afterwards, at an adjourned day of the regular May term, 1883, of said court, and on the 7th day of August, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

It is ordered by the court that the hearing of the objections to plaintiffs' bill of exceptions be continued until the next term of this court.

Afterwards, at an adjourned day of the regular October term,

1883, of said court, and on the 25th day of February, A. D. 1884, the following entry appears of record in said cause, to wit:

39 JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day came the parties, by their attorneys, and the objections to the bill of exceptions being called for hearing, the argument thereof by counsel progressed; and, not being concluded at the hour of adjournment, it is postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 27th day of February, A. D. 1884, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Now again come the parties, by their attorneys; whereupon the argument of the objections to the bill of exceptions is proceeded with; and, not being concluded at the hour of adjournment, is postponed till to-morrow morning.

Afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 28th day of February, A. D. 1884, the following entry appears of record in said cause, to wit:

40 JOSEPH TEAL *et al. against* JOHN S. BILBY.

Now again come the parties, by their respective attorneys; whereupon the argument of the objections to the bill of exceptions progressed; and, being concluded, said objections are submitted to the court.

Afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 7th day of April, A. D. 1884, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Upon motion of plaintiffs, and by consent of counsel for defendant, it is ordered that the further hearing of objections to the bill of exceptions be continued till next term.

Afterwards, at an adjourned day of the regular May term, 1884, of said court, and on the 16th day of June, A. D. 1884, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

41 This day come the parties, by their attorneys, and the bill of exceptions of plaintiffs being again presented to the court, the same are signed and sealed by the judge and ordered to be made a part of the record herein; and thereupon said bill of exceptions is filed.

Said bill of exceptions is in words and figures as follows, to wit:

42 *Bill of Exceptions.*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at the October Term, A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN T. STORRS, Copartners, doing business under the firm name of Joseph Teal & Co., Plaintiffs,
against
JOHN S. BILBY, Defendant.
} No. 409.

Be it remembered that this cause came on to be heard at this term, held on the — day of December, A. D. 1882, before the Honorable Arnold Krekel, judge of said court, and a jury.

Thereupon said court, at plaintiffs' request, consolidated this action with action No. 405, between same plaintiffs and defendant, for the purpose of trial, and said causes were tried before the same jury and on the same evidence, which was submitted for the purpose of the trial of both of said causes, and upon the same instructions given to the jury on both of said causes.

Thereupon plaintiffs, to maintain the issues on their part, introduced evidence tending to prove the following facts:

43 I.

The plaintiffs, as copartners, were the owners of three thousand and seven head of good graded American cattle, in good condition and fine health, in the county of Wasco, State of Oregon, in the month of June, 1880; that these cattle were from two to eight years old, 325 being long 2 years old, but the greater portion being from four to five years old, all steers, except about sixty speyed cows; and that said plaintiffs, as such partners, were interested in the cattle as follows: Joseph Teal, one-third; Henry Coleman, one-third; and John Y. Todd and John T. Storrs, one-third.

That on the tenth and fourteenth days of June, 1880, said cattle were started by plaintiffs from Prineville and the Des Chuttes river, in Wasco county, Oregon, in two herds, of about fifteen hundred head each, one under the charge of Coleman, and the other under Todd, to be driven across the plains eastward to a shipping point in Wyoming Territory, on the Union Pacific railway, and that they commenced arriving at Sheep creek, twenty miles northwest of Rock Creek station, on that railway, about the third day of October, 1880, in good condition, but thin in flesh.

That said cattle had traveled a distance of about thirteen hundred and sixty miles, and had been driven on the trail an average of from eight to twelve miles per day, the herds at times mingling together, but kept separate on the drive for the purpose of
44 grass and water; that during the time they were on the journey the cattle had usually good grass, such as the country afforded, and plenty of water on the route, except that at one time in the sand hills, near the foot of the Three Teton Mountains, they were from one morning until the next morning without water.

That in connection with these two herds there was a drag band composed of lame cattle, and consisting of such cattle of the two herds as were disabled from traveling with them from time to time on the route, and that this drag band of lame and disabled cattle amounted at the time of the arrival of the cattle at Rock Creek station to between two and three hundred head.

That said cattle remained at and in the vicinity of Sheep Creek Valley, with plenty of water and fair grass, while there, awaiting cars for shipment at Rock Creek station, and that as soon as practicable after the arrival of the cattle they were put on board cars and shipped to Council Bluffs, in the State of Iowa, between the 14th day of October and the 10th day of November, A. D. 1880.

That the first shipment was made October 14th, 1880, of about three hundred and seventy-nine of these cattle from Rock Creek station to Council Bluffs, on cars over the Union Pacific railway, a distance of about seven hundred miles, and that these cattle arrived at Council Bluffs on the 17th day of October, 1880; that this
45 first shipment averaged with the balance of the herd in age, weight, health, and condition at the time of shipment, and were in good healthy condition, but thin in flesh, and that they were stopped, unloaded from the cars, fed, watered, and rested from twelve to twenty-four hours at North Platte city, on the Platte river, on the route from Rock Creek station to Council Bluffs, as were all the other shipments of the herd made from same point to Council Bluffs. That there were from sixteen to nineteen cattle placed in each car of the various shipments, with two men in charge of the cattle for the owners on each train; the trains all stopped at North Platte city, and the cattle unloaded, watered, and fed, and rested from twelve to twenty-four hours, sent on to Council Bluffs, and there unloaded at the Union Stock Yards, and watered and fed immediately on arrival.

That after the first train load of these cattle had been received at the stock yards at Council Bluffs they were seen and examined by defendant Bilby at that place. That defendant was introduced to Joseph N. Teal, a son of one of the plaintiffs, by Mr. A. V. Bass, of the firm of Rosenbaum, Bass & Co., stock commission merchants, at Council Bluffs, and agents for plaintiffs, in handling their cattle, and was represented to plaintiffs as a large farmer and stock-feeder from Missouri, who owned large bodies of land and thousands of bushels of grain and good pastures, and had experience and
46 success in feeding western Oregon cattle, similar to those of Teal & Co., and was seeking either to buy cattle or to arrange about feeding them for the owners.

Upon examination of this first load of Teal & Co.'s cattle defendant was satisfied with them, and so expressed himself, and thereupon negotiations were entered into between defendant and Joseph N. Teal, for plaintiffs, for defendant to feed fifteen hundred of these cattle for plaintiffs, the first shipment to be a sample lot of what was to follow, and to save dispute Mr. A. V. Bass was made judge of the cattle.

At this time, and before the final execution of the contract, de-

fendant knew and was informed by the plaintiffs of the manner in which the cattle had been handled on the trip from Oregon to Council Bluffs, and that they had passed through at and in the vicinity of Rock Creek station, and the treatment they had received before shipment.

Afterwards, and on the 3d day of November, 1880, at Council Bluffs, plaintiffs and defendant entered into written contract of that date, which is in words and figures as follows, to wit:

"This contract, entered on this day, November 3d, 1880, by and between J. Teal & Co., of Portland, Multnomah county, Oregon, of the first part, and John S. Bilby, of Fairview, Nodaway county, Missouri, of the second part, is as follows:

47 J. Teal & Co. to weigh fifteen hundred (1,500) cattle at the transfer stock yards, Council Bluffs, Iowa, after feeding, watering, and then shrinking twelve hours, to be delivered to John S. Bilby, at Dawsonville, Missouri; said cattle to be fed, watered, weighed, and handled by Rosenbaum, Bass & Co., transfer stock yards, Council Bluffs, Iowa. The cattle to be delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Wasco county, Oregon, to Rock Creek, Wyoming Territory, branded with "T" on the left side, similar in age, flesh, and quality to a train load that arrived at Council Bluffs, Iowa, on Sunday, October the 17th, 1880, Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train load which arrived on Sunday, October 17th, 1880. If any train of cattle shall arrive prior to twelve o'clock, m. they shall be taken off feed and water the same evening of the day of arrival at seven o'clock, p. m.; if they shall arrive after twelve o'clock, m. they shall be shut off of feed and water at seven o'clock p. m. of the following day. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw, and stock fields, until grass comes. To be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date, on each and every

48 day, they shall be fed all the corn they will eat until delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales, to any feed lot, where each bunch of cattle may feed, after a twelve hours' shrink, such shrink to be within the same hours as when the cattle were first weighed and delivered. Cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard, they shall come and make selections of such cattle as they wish to cut out, from two to five days prior to the day of weighing. Said cattle to be weighed and delivered in lots of from one hundred and seventy-five (175), to two hundred and twenty-five (225), between the fifteenth day of October, 1881, and the first day of December, 1881, by giving ten days' notice, either by telegraph, letter, or in person, at the option of J. Teal & Co., agreeing to pay five cents per pound for all increase of weights, from time of weighing to Bilby, to time of reweighing back to J. Teal & Co. They further agreeing

to advance one thousand (1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to payment of weights added to cattle on last delivery, John J. Bilby to be responsible for all cattle lost, strayed, or stolen, and for any dying through the neglect or carelessness of the said John S. Bilby. Any dying through causes which are unavoidable shall be shared thus: J. Teal
49 & Co. to bear the loss of the steer, and John S. Bilby the feed. If any steers die, John S. Bilby shall preserve the hide as evidence of death, and the ears if there are any ear-marks. It is further agreed that if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said sum, and the amount to be paid on the delivery of cattle to said J. Teal & Co. The said John S. Bilby agrees that if said cattle remain in his possession until December 1st, 1881, that he shall so feed and care for them, that will increase four hundred and fifty (450) pounds each on an average.

(Signed) JOSEPH TEAL & CO.
JOHN S. BILBY.

JOHN N. BALDWIN, *Witness.*

At the time of the final execution of this contract by the parties thereto all of the cattle received by defendant under it were at Council Bluffs, were seen and examined by defendant, and he expressed himself to plaintiffs and to Mr. A. V. Bass well satisfied and pleased with them.

At the time of the signing of the contract by the parties thereto, defendant, at plaintiffs' request, and in order to obtain their assent and signatures thereto, executed to plaintiffs a bill of sale
50 of the cattle to be delivered to defendant, which is in words and figures as follows, to wit:

Know all men by these presents, that I, John S. Bilby, of Nodaway county, and State of Missouri, of the first part, for and in consideration of the sum of forty-five thousand (45,000) dollars, lawful money of the United States, to be paid to J. Teal & Co., of Portland, in the county of Multnomah, State of Oregon, second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, their executors, administrators, and assigns, the following-described property now in his possession, to wit: Fifteen hundred (1,500) head of steers, from two to five years old, branded with "T" on the left side; to have and to hold the same unto the said party of the second part, their executors, administrators, and assigns, forever; and I do for my heirs, executors, and administrators covenant and agree to and with the said party of the second part, their executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels, hereby made unto the said party of the second part, their executors, administrators, and assigns, against all and every person and persons whomsoever.

In witness whereof, I have have hereunto set my hand, this third day of November, A. D. 1880.

JOHN S. BILBY.

51 STATE OF IOWA, } ss:
Pottawattomi County, }

On this third day of November, 1880, before me, a notary public, within and for said county, personally came John S. Bilby, personally known to me to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the execution of the same to be his voluntary act and deed for the purpose therein expressed. Witness my hand and notarial seal.

[SEAL.] JOHN N. BALDWIN,
Notary Public.

Plaintiffs' attorneys, upon reading bill of sale, stated that they introduced it as a part of this transaction, and to show that defendant was not the owner of the cattle.

Of the cattle mentioned in the contract there were received at the Union Stock Yards, at Council Bluffs, from Rock Creek station, over the Union Pacific railroad, November 1st, 1880, sixteen cars containing 340 head, and fifteen cars containing 309 head; November 2nd, 1880, eight cars containing 170 head, and November third, twenty cars containing 441 head, and nineteen cars containing 414 head. Of the cattle in these shipments five died in transportation from Rock Creek to Council Bluffs, and their carcasses were brought to Council Bluffs in the same cars they were shipped.

52 The evidence tended to show that the defendant was present at Council Bluffs, and about the stock yards, in the regard to the contract, for the feeding of these cattle, at the time of the receipt of these cattle at the stock yards in Council Bluffs. Defendant was present at the time of the receipt of these cattle at the stock yards at Council Bluffs. They were placed in different pens there, and were well fed and watered in the stock yards while remaining there, the same as the cattle are that come and stay there any length of time, and were at the times of such arrival in age and quality and condition and having the same brand as the sample train load mentioned in the contract as arriving October 17th, 1880. About thirteen hundred of these cattle were seen and examined by Mr. A. V. Bass, of the firm of Rosenbaum, Bass & Co., of the transfer stock yards at Council Bluffs, mentioned in the contract, as they arrived there, and were judged by him to be an average lot with the train load of October 17th, 1880, as to age and grade, but were thinner in flesh.

Of these cattle there were weighed at Council Bluffs, by said Bass to defendant, under the contract in evidence, one thousand head, November 4th, 1880; three hundred November 5th, 1880, and two hundred Nov. 6th, 1880, making in all fifteen hundred head of cattle, and averaging nine hundred and fifty pounds per head, delivered to defendant Bilby under the contract of November

53 3rd, 1880. Mr. Bilby was present at the weighing of the cattle, and assisted in weighing them, and expressed himself satisfied with them. The cattle thus weighed to defendant Bilby and received by him were all branded "T" on the left side; were a part of the Oregon trail of J. Teal & Co.; were selected from the ship-

ments by plaintiffs, who endeavored to give defendant the best of the cattle, in order that the best cattle could be put out to feed, and all were taken off feed and water at Council Bluffs and shrunk before weighing, in pursuance of the terms of the contract between plaintiffs and defendant.

After these fifteen hundred head of the Oregon trail cattle of plaintiffs had been weighed, they were, on the 4th, 5th, and 6th days of November, 1880, placed on the cars at Council Bluffs, and shipped on the Wabash, St. Louis and Pacific railway to defendant at Dawsonville, Missouri, a distance of eighty miles. The freight on these cattle from Council Bluffs to Dawsonville, amounting to $1,169.50, was, at the instance and request of plaintiffs, paid by defendant to the railroad company. That the "drag-band" of the Teal & Co. herd, consisting of two hundred and seventy-seven head, arrived at Council Bluffs from Rock Creek station November 12th, after the cattle delivered to Bilby had been shipped to Dawsonville, and none of them were included in the Bilby cattle or delivered to him, but all were otherwise disposed of by plaintiffs.

54 2. Plaintiffs further introduced evidence tending to prove that these fifteen hundred cattle arrived at Dawsonville, Missouri, on cars, as follows: Forty-nine cars November 4th, 1880, at 7.30 p. m., 9 p. m., and 10 p. m.; fifteen cars November 5th, 1880, at 8 p. m., and ten cars November 6th at 9 p. m., without having either food or water on the trip from Council Bluffs to Dawsonville.

That the cattle were unloaded after arrival, and crowded into insufficient stock pens and lanes, and remained without food or water until taken away.

That the cattle were divided into two herds by defendant, and about eleven hundred of them were driven away the next days after arrival, without food or water, to the open prairie, a distance of one and a half miles west of Dawsonville, and placed on an unenclosed piece of ground, which had been grazed down by neighboring cattle, and were permitted to remain there without food or water for two days and nights, when they were driven South, kept on an open prairie without food or water that night, and then driven to a large pasture and stock field on the Nodaway river.

That the remaining four hundred were unloaded at Dawsonville and kept in the stock pens and lane without food or water thirty-six hours, while they were branded by John Wishard for defendant, and then driven West and taken and placed in grass pasture.

55 That each of said herds were kept by defendant and his employés upon insufficient food, and were not well wintered upon hay, straw, and stock fields by defendant; that said cattle suffered for want of food and water during the months of November and December, 1880, and January, February, and March, 1881; that at no time did they have sufficient hay or straw for food for more than a few days at a time, and that for the greater portion of said months they had neither hay nor straw, but were kept upon cornstalks, and stubble fields, and dry, dead grass pastures after such fields and pastures had been eaten bare of food for the cattle, and that they were during said months, for a week to ten days at a time,

in such stock fields and pastures in a starving condition, thin in flesh, and many dying for want of food and water; that at no time were said cattle sheltered or protected from the stormy or severe cold weather of the winter of 1880 and 1881, and that some died from exposure to snow storms; that in the various fields in which the cattle were held during the winter the stocks were eaten down until the stubs were not more than a foot or two feet high, and bare of blades and husks; that the grass, weeds, and vegetable growth of every description were cleaned off by the cattle until the fields were perfectly bare; that the cattle on different occasions broke from their enclosure, and over fences and into adjoining corn-fields, for
56 food, and that some of them died from overeating in such neighboring fields; that some of said cattle were drowned in Nodaway river, in defendant's fields, by moving in the mud and water of the river in attempting to get water to drink, and that others died after moving in the mud at the springs in the enclosure when they went for water.

That in the spring of 1881, and in the month of April, before the wild grass had grown upon the prairie sufficient for food for the cattle, they were placed on unenclosed prairie range, and permitted to remain there without sufficient food or water until about the month of June, 1881, when said prairie was enclosed by defendant, and that in the summer of 1881 said cattle were held in the enclosures, which did not furnish sufficient grazing or water for the cattle.

That said cattle were not fed all the corn they could eat during the fall and winter of 1881; that defendant placed said cattle upon corn about the 15th day of August, 1881, and fed them partly green corn and stocks, and partly musty old corn, until corn matured that year; that said cattle were not full fed during the months of August, September, October, and November, 1881, by defendant on corn, and that on different occasions a portion of said cattle, in the fall of 1881, broke from their enclosures into adjoining corn fields in search of food, and some of them were killed by overeating in such adjoining fields.

57 That from want of sufficient hay, straw, and stock pasture, and from want of water in the winter of 1880 and 1881, as herein stated, and from want of proper care and attention to said cattle by defendant during the time they were in his possession, one hundred and fifty head of said cattle died.

The plaintiff Coleman resided with defendant from on or about the 5th of December, 1880, up to the time of that last shipment, and continued to live with him and to look after the cattle in defendant's care until the March following; after that time he remained on defendant's premises, and boarded with one of his tenants; he was until on or about the middle of September at all times with plaintiffs' cattle.

While the plaintiff Coleman resided with the defendant he was furnished a horse by the latter, which he could and did use to ride over defendant's premises to look after the cattle in charge of the defendant and his employees.

The plaintiff Coleman did from time to time assist the defendant

and his agents and employees in moving the cattle about defendant's premises during the winter, and took immediate charge of four hundred of them under defendant, and with these cattle so under his charge there were at least two hundred of defendant's cattle, including cows and calves, and while they were so under his charge the said Bilby lost one cow, while giving birth to a calf, and no others,
58 and several of plaintiffs' died; the said Coleman had such charge of them for at least one month, beginning December, 10th, 1880.

400 of the cattle delivered into the custody of Wishard were kept on another part of defendant's premises by Wishard for defendant. These cattle the plaintiff Coleman did not visit for the purpose of ascertaining the care and treatment they were receiving at the hands of Wishard for Bilby until on or about the 11th or 12th of January, 1881. He did not visit them again and examine as to their care and treatment by Wishard until nearly a month later.

The plaintiff Coleman was a well-to-do and experienced cattle man who had been engaged in the business of handling and selling cattle for a great many years previous to the time plaintiffs entered into the contract with defendant.

3.

That on the 1st day of September, 1881, plaintiffs, in accordance with the terms of said written contract, paid to defendant the sum of one thousand dollars in cash, for which defendant gave a receipt, endorsed by defendant, on said contract, which is in words and figures as follows, to wit:

$1,000. NODAWAY COUNTY, MISSOURI, *September* 1*st*, 1871.

Received from Joseph Teal & Co. the sum of one thousand dollars on the within contract.

JOHN S. BILBY.

Defendant also executed to plaintiffs at the time of said payment another receipt, as follows:

59 NODAWAY COUNTY, MISSOURI, *Sept.* 1, 1881.

Received of Joseph Teal & Co. the sum of one thousand dollars, on contract of December 3rd, 1880, same being endorsed on contract at this date.

J. BILBY.

That afterwards and before the first day of December, A. D. 1881, plaintiffs duly notified defendant that they would be ready to receive and demand the delivery of the fifteen hundred head of cattle according to the terms of the contract of date November 3rd, 1880, at Dawsonville, Nodaway county, on the first day of December, 1881.

That in pursuance of said notice (342) three hundred and forty-two cattle, then in the possession of said John Wishard, the subcontractor of defendant, were weighed on the first day of December, 1881, and that on the 1st and 2d days of December, 1881, (898) eight

hundred and ninety-eight of said cattle in possession of defendant were weighed, and the total weight of said (1,240) twelve hundred and forty head of cattle was 1,595,165 lbs., an average of 1,276 lbs. per head, which is an average gain of 356½ lbs. per head, said cattle weighing at the time of their delivery to defendant an average of 950 lbs. per head.

That after said cattle were weighed the same were driven to Dawsonville on the second and third days of December, 1881. The plaintiffs were present, ready to receive the cattle under the terms of said contract and demand at Dawsonville, December 1st, 1881. That after the 1,240 cattle had arrived at Dawsonville plaintiffs made another demand of defendant for the fifteen hundred head of cattle according to the contract to be delivered at Dawsonville, and notified defendant that they were ready to settle according to
60 the contract, and demanded the production of the hides of such as had died, according to the terms of the contract, and that defendant refused to deliver any of the cattle to plaintiffs until he was paid for the number of pounds put on them by the care and feed of defendant, and claimed that he had preserved the hides of such as had died and had notified plaintiffs thereof.

That said cattle remained at Dawsonville in defendant's possession until the 7th day of December, 1881, and while in his possession were kept on insufficient food and water. That on the 7th day of December the United States marshal, under the writ of replevin, took from the possession of defendant twelve hundred and twenty-nine of said cattle and delivered them into the possession of plaintiffs at Dawsonville, Missouri, from which place they were immediately placed on board cars and sent to Chicago, in the State of Illinois.

That at the time said cattle were delivered at Dawsonville by defendant on said 2nd and 3rd days of December, 1881, said cattle were thin in flesh, were not good, fat cattle for beef, and were not worth as much as cattle similar in quality and condition, but weighing fourteen hundred pounds, by one dollar and fifty cents per hundred pounds.

Plaintiffs then introduced evidence tending to prove that said cattle were injured by reason of want of proper care and sufficient food and water from the time they were brought to Dawsonville, on the 2d and 3rd days of December, 1881, after being weighed, until they were taken by the United States marshal under the writ of replevin, on the 7th day of December, fifty cents per hundred pounds on each head.

61 Plaintiffs then introduced evidence tending to prove that after said cattle had been taken by said marshal under said writ, said 1,229 head of cattle were well cared for, fed, and watered by plaintiffs until they were transferred by railroad on cars to Chicago, Ill., about the 10th day of December, 1881.

Plaintiffs then introduced evidence tending to prove that there was no market for the sale of such a large lot of cattle as those taken by said marshal under said writ, at Dawsonville, Missouri, at the time said cattle remained there, in the month of December, 1881, so that

said cattle could be sold for their full value, or that said cattle could be sold or disposed of at Dawsonville at that time, except by dividing the herd and selecting the different grades for shipment as beef cattle, and for feeders of cattle therefrom, and selling or disposing of the same in such lots and grades.

4. Plaintiffs then offered to prove by deposition of Samuel Wood, duly taken and certified in said action, and by other competent and credible witnesses, that said cattle were received at Chicago on and about the 12th day of December, 1881, and were sold on the market at the full market value of said cattle at the time, at from 3 & ½ to 4 cents per pound, and that the total amount received by plaintiffs at Chicago for said cattle was $54,123.29, which was their full value at that time and place, and that Chicago was the nearest general market for said cattle to the town of Dawsonville.

62 To which deposition and all testimony offered by plaintiffs to prove said facts, or either of them, defendant objected, and said objections were by the court sustained; and the court refused to allow plaintiffs to read said deposition or produce any such testimony before the jury, and excluded the same from the jury; to which action of the court in refusing to allow plaintiffs to read said deposition or produce said testimony before the jury, plaintiffs at the time duly excepted and still except.

Plaintiffs then further offered evidence tending to prove, by the deposition of said Samuel Wood, and by the depositions of other competent witnesses at Chicago, duly taken in said action, that said cattle were not in a good condition for beef cattle, but were too thin in flesh; that cattle of like quality, but weighing fourteen hundred pounds, were worth more in the markets of Chicago during the month of December, 1881, than the cattle of plaintiffs in the condition they were as to weight at that time, of two dollars and fifty cents per hundred pounds.

Plaintiffs then introduced evidence tending to prove that on the first and second days of December, 1881, at Dawsonville, Missouri, said fifteen hundred head of cattle, if they had been increased in weight four hundred and fifty pounds each, so as to weigh on an average fourteen hundred pounds, would have been worth five and one-fourth cents per pound, and that the twelve hundred and twenty-nine head of cattle taken by the marshal were not worth as much at that time and place by one dollar and fifty cents per hundred pounds as if the same cattle had weighed fourteen hundred pounds per head, but that there was no market for such cattle at Dawsonville
63 at that time, so that said cattle could be sold, or otherwise disposed of, excepting by dividing the same into lots and grades for shipment as beef cattle and as feeders.

Defendant, to maintain the issues on his behalf, offered evidence tending to prove the following facts:

1. That the Oregon trail cattle of plaintiffs arrived near Rock Creek station early in the month of October, 1880, very poor in flesh, and that they were held on the open range in the vicinity of Seven Miles Springs, northwest of Rock Creek station, and the Soda Lakes,

about 12 miles from Rock Creek. That there was very little grass in that vicinity, and water was very scarce. That there was no water there, except the springs, the water of which was alkali. That the water on Rock Creek was standing in holes—no running water in it—and that most of the holes were frozen solid, a few not. That the Teal cattle arrived late in the season, and after other herds had been on the ground. That the snow came at and in the vicinity of Rock Creek very early that fall, the first snow being about the 20th day of September, and that during the time the cattle remained there the weather was very severe, but not very cold until the middle of October. That for ten days previous to the latter part of October, was very snowy and stormy, and that the snow on the ground around Rock Creek where the cattle were herded was about four inches deep, and that the thermometer at times ranged from 25 to
30 degrees below zero. That the cattle, during the time they
64 were held in the vicinity of Rock Creek, could get no water,
except the alkali water. That the range was bare of grass; the snow covered the ground; cattle could get nothing to eat, and that they were exposed to the snow and storms and cold weather while in that vicinity. That the herders of plaintiffs were two white men and six or seven others, Indians, who did not understand herding cattle. That the first shipment from Rock Creek was made Oct. 14th, 1880, of twenty cars, eastward to Council Bluffs, and that these cattle were stronger and in better health and flesh than those shipped afterwards. That of the cattle that remained after the first shipment, a portion had been held in the storms, and had been driven to Rock Creek once for shipment, and back to Seven Miles Springs for want of cars. That these cattle were herded at Rock Creek before shipment, kept in pens one night, turned out and held on the Divide, where there was no feed, and penned again at night, then drove back to Seven Miles Springs, and afterwards again brought to Rock Creek station and loaded on cars, about the last of October, 1880.

That some twelve to fifteen of the cattle died on the range between Rock Creek and Soda Lakes, and that the cattle at the time of the shipment were very poor and weak, so that a number of them were down, and had to be prodded up to get them up, and that one died in loading on the cars. That the water on the range was damaging to the cattle, and would have the effect of scouring them, make them weak and sick, caused the hair to come off after they were delivered to Bilby, and that the cattle would have a scabby appear-
ance. That the cattle were not carefully and judiciously
65 handled while at and in the vicinity of Rock Creek. That
they were herded by Indians, who handled them very roughly, and jammed them around and close-herded them, and that the cattle were damaged and injured while there by the treatment they had received, want of food and good water, exposure to storms and extreme cold weather, and from drinking the water strongly impregnated with alkali of Seven Miles Springs and Soda Lake.

3. Defendant further, to maintain the issues on his part, introduced evidence tending to prove that the Oregon trail cattle of plaintiffs

commenced arriving on cars from Rock Creek station on the 17th day of October, 1880, and that there was one or two shipments between that date and November 1st, before any of the cattle which defendant received under the contract of November 3rd, 1880, had arrived at Council Bluffs. That of the shipment of cattle from which the fifteen hundred head delivered to defendant under said contract were taken there were a great many of them down in the cars on their arrival at Council Bluffs and a large number of them jammed and bruised and others dead in the cars. That the cattle down in the cars on arrival at Council Bluffs were so weak and exhausted from want of sufficient food and water that they had to be pulled out of the cars, and that cattle on arrival at Council Bluffs were in a poor condition as to flesh, and looked as if they had suffered from want of food and proper handling. That of the cattle that were down in the cars and others of these shipments, at least fifty died either in the cars or after they had been placed in the pens at the
66 stock yards at Council Bluffs and their carcasses were sold by plaintiffs. And that others of these cattle were down in the yards and could not get up on account of weakness from want of food and water.

That immediately on arrival the Teal cattle were given all the hay they could eat and all the water they could drink as other cattle coming in the yards, and that said cattle had all the hay they could eat and all the water they could drink while in the stock yards. That the 2,600 or 2,700 head of Teal & Co. cattle, at Council Bluffs, were fed 90,000 lbs. of hay from Nov. 1st to Nov. 5th, 1880; that a portion of the first shipment of these cattle received by Bilby amounting to about five hundred were so fed and watered for three or four days, and that the cattle weighed more by reason thereof by between 25 & 50 lbs. than they otherwise would have weighed if they had been taken off feed and water the same day of arrival or the day thereafter, as provided by the contract; that the cattle were not shrunk before weighing as provided by the contract and this was unknown to the defendant and to said Bass. That defendant did not examine the cattle on their arrival at Council Bluffs until after they were weighed, and that he had no personal knowledge of the manner they had been treated after arrival at Rock Creek station and before arrival at Council Bluffs, and was not informed thereof by plaintiffs at any time.

That said A. V. Bass, mentioned in the contract as the judge of the cattle as to age, flesh, and quality, did not look after the matter of the selection of weight of the cattle, except as to the thir-
67 teen hundred head which he delivered to defendant, although he knew of the weighing of the other two hundred head for the defendant.

That said Bass did not know anything about how the cattle (delivered to defendant under the contract) had been treated between October 17th and November 1st, 1880, at and in the vicinity of Rock Creek station.

Defendant introduced evidence tending to prove that the time A. V. Bass undertook to act as judge between plaintiffs and defendant

as to the kind of cattle that plaintiffs should deliver to defendant under said contract, the firm of which the said A. V. Bass was a member was receiving a commission of fifty cents per head on each and every head of cattle delivered by the plaintiffs to defendant under said contract, which fact was unknown to defendant at the time of his receiving said cattle.

That 1,300 head of said cattle were taken to Dawsonville by def't on the cars about November 4th, 1880, and were in no better condition when shipped than when they arrived at Council Bluffs, except that they had been fully fed and watered. That in shipping the cattle on board the cars at Council Bluffs for Dawsonville, some of the cattle were so weak from want of proper feed and care, and others were not in a fit condition to ship at all, owing to their weak and debilitated condition, and that on arrival of the cars at Dawsonville there was one of said cattle dead in the cars.

The defendant introduced evidence tending to show that the agent of the plaintiffs accompanied the cattle from Council Bluffs to Dawsonville for the purpose of delivering the same at Dawsonville to the defendant, and also for the purpose of examining and
68 ascertaining the fields of the defendant and his facilities for carrying out the contract for the keeping of the cattle.

Defendant introduced evidence tending to show that he was the owner of a large body of land consisting of about fourteen thousand (14,000) acres, and had abundance of pasturage, hay, straw, and stalk fields, and corn for carrying out the contract, and that the said land was well supplied with good living water.

Defendant introduced evidence tending to show that the agent of plaintiffs who accompanied the first thirteen hundred cattle was present at Dawsonville and superintended their unloading from the cars and delivery at that place to the defendant, and that the defendant then engaged a sufficient number of men to take charge of the cattle, and that they were unloaded as rapidly as possible. That upon their arrival at Dawsonville they were in a very weak condition. That they were properly handled while there, and with care driven to defendant's farm, a distance of about eight miles, having on the drive an abundance of food and water.

Defendant introduced evidence tending to prove that from the time the fifteen hundred cattle were received by the defendant at Dawsonville, upon the time of the delivery at Dawsonville in December, 1881, they had been in charge of careful, prudent, and experienced feeders, being kept all the time in pastures and feed-pens, and fed in accordance with the terms of the written contract and as the same was modified in December, 1880.

69 Defendant further introduced evidence tending to prove that a part of the cattle delivered to the defendant by plaintiffs were not a part of the herd which the sample lot belonged to, and that this fact was unknown to the defendant or his agent when said cattle was received and examined by the defendant Bilby at Dawsonville.

4. Defendant, further to maintain the issues on his part, introduced evidence tending to prove that on the arrival of the fifteen

hundred head of cattle, received by him under the contract of November 3rd, 1880, said cattle were in a feverish condition, were unloaded as rapidly as possible from the cars, divided into herds, and driven carefully and slowly, and as soon thereafter as practical, from Dawsonville to pasture near Fairview, about eight miles distant, and that 1,100 head of them were turned on good grass pastures for a few days, and that such pasturing was best for the cattle, after which they were placed in stock fields, where they had access to straw stacks, hay, and good water.

That the balance of the cattle were driven by Wishard slowly about ten miles southwest of Dawsonville and placed in a pasture field of wild and tame grass, with stacked hay, straw, and cornstalks, where they remained about four weeks, with plenty of feed and good water, and that thereafter they were placed upon stock pasture with hay, straw, and cornstalks. That in driving the cattle from Dawsonville to the various pasture fields from five to ten of them died from weakness and exhaustion, and within thirty days thereafter from twenty-five to thirty died in the fields from same causes, and that the cattle were in very poor condition, weak and thin,
70 and did not improve upon the feed they were receiving.

Defendant introduced evidence tending to prove that about four hundred of the defendant's cattle ran with the cattle received from plaintiffs, fed the same and received the same treatment, and that out of these two hundred only two died, and that the defendant sold a large number of his cattle in Chicago markets during winter of 1880 & 1881 as fatted beef cattle which had received precisely the same care and feed as plaintiffs'; that plaintiff Coleman took charge himself of one of such shipments by defendant to Chicago.

That defendant introduced evidence tending to prove that the three hundred head of cattle which arrived at Council Bluffs October 17th, and referred to in the written contract as the sample lot, were a picked lot of younger and stronger cattle, and in better flesh than those which followed. The cattle afterwards received by Bilby were a mixed lot of cattle, whose ages ranged from two to eleven years, and that the cattle received by Bilby were remnants or tailings of the herd.

That Teal & Co. had become indebted to Rosenbaum, Bass and Company, their commission merchants, in a considerable sum, and that they had previously sold all the cattle belonging to the herd driven by them from Oregon to Rock Creek and afterwards shipped to Council Bluffs which were available for sale. And that there were cattle delivered to the defendant at Dawsonville which did not belong to the herd from which the sample lot of October 17th, 1880, were taken, but that the plaintiffs had procured during the cold season preceeding November 1st certain other cattle at Cheyenne, Wyoming Territory, which they delivered to the de-
71 fendant as part of the herd from which the sample lot had been selected, which fact was unknown to Bass and defendant.

The defendant introduced evidence tending to show that the appearance of the cattle, when they were delivered to him by the

plaintiffs, would not disclose the treatment they had received previously, and that it required time to develop the evil effects of such treatment; that although the cattle might appear to be very thin and weak, yet it would not be apparent that they were diseased; on the contrary, experienced cattle men might well suppose that they would upon the treatment provided for in the contract soon recover their flesh and strength.

He also introduced testimony tending to show not only the death of two hundred and sixty-eight of the cattle as aforesaid, but that as to many of the others that survived the winter of 1880 and 1881, although they were fed upon corn, all they could eat during the winter, they always presented a scabby appearance, and did not thrive from their food, and that when the spring came they were placed upon grass. They did not shed their hair, but were, in the language of a number of the witnesses "stuck cattle."

And that upon an examination of the cattle it was considered by said Coleman and defendant that the cattle could not be wintered on hay, straw, and stock fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time that they went into corn that winter should be deducted off of the corn feed next year at the end of the next grain feeding, and that defendant
72 should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds per head.

Defendant introduced evidence tending to show that the time the defendant received the cattle from the plaintiffs to September 1st, 1881, all the plaintiffs, except Coleman, were residing in the State of Oregon; that the plaintiff Coleman accompanied these cattle from Oregon to Council Bluffs. That on the 4th of December the plaintiff Coleman went to the defendant's house and remained there for a period of fifty-nine days, seeing these cattle every day, was familiar with the manner in which they were being fed, and assisted in taking care of the same, having the use of the defendant's horses for the purpose of riding over the fields and pastures to inspect the cattle, and after the expiration of the fifty-nine days to the first of September, 1881, he remained on the defendant's farm, boarding with one of the defendant's tenants, where these cattle were being kept, and was familiar with the manner in which they were being fed and their treatment, and that during all that time, from the fourth day of December, 1880, to the 1st day of September, 1881, he made no complaint as to the treatment these cattle received from the defendant.

That on the 1st day of September, 1881, the plaintiffs paid the defendant one thousand (1,000) dollars for feeding said cattle, and that all of the two hundred and sixty-eight cattle excepting two had died prior to the said first of September; and that it was through no fault or negligence of defendant that any of plaintiffs' cattle died while in his care, but that they died through unavoidable causes.

73 Defendant further introduced evidence tending to prove

that plaintiff Coleman had made statements thereafter to various witnesses on different occasions which tended to prove that the contract had been changed, as testified to by defendant.

Defendant then introduced evidence tending to prove that immediately after the said change and modifications of the written contract defendant placed said cattle in stock fields and corn-fields, which contained good corn in the ear, and that they were fed, except for a few days, from that time forth through and during the winter of 1880 and 1881 all the corn and feed that they would eat, but that many of said cattle were in such weak and exhausted condition from previous bad tratment before Bilby had received the cattle that a large number of them, amounting to two hundred and sixty-eight, died while in possession of Bilby. That said cattle were fed about seventy-five days during said winter of 1880 and 1881 on corn, and stock fields were placed in good grass pastures in the spring of 1881, after grass came in enclosed grass pastures on good grass, with plenty of water, until August the 15th, 1881, except a part of them for a short time were placed on prairie, where there was good grass and fenced all around, except the road openings, and these were guarded, when the cattle were fed with all the corn they could eat until November 1st, 1881. That on the 28th day of October, 1881, defendant served the plaintiffs with the following notice:

To JOSEPH TEAL, ——.

74 SIRS: You will take notice that on Monday, the 31st day of October, 1881, I shall begin to weigh and complete the weighing as soon as practicable of the steers placed in my keeping under contract with you in the fall of 1880. Under and by virtue of said contract, as finally made, said steers were fed corn for two and one-half months in the fall of 1880, whereby your option under the same as to the time of receiving said steers expired on October 1st, 1881.

I hold myself in readiness to deliver said steers after weighing to you at Dawsonville, Mo., in such numbers as you may desire, pursuant to the terms of said contract, after payment being made to me of the interest the weights may prove I have in the same, together with the advanced freights thereon.

Said weights will be made at Fairview, Nodaway county, Mo., and on my farm on section 5, township 65 of range 38, in Atchison county, Mo.

JOHN S. BILBY.

Fairview, Nodaway Co., Mo., October 25th, 1881.

This was served at Council Bluffs, Ia., on both Teal and Coleman on the 28th of October, '81, by copy, by Jno. A. Wishard.

That in pursuance of said notice at Fairview, and on said 1st day of November, 1881, defendant weighed said cattle, amounting to 1,243 head, and that said 1,243 cattle weighed one million five hundred and fifty-three thousand three hundred and five pounds. The plaintiffs did not appear at said place to receive said cattle or comply with the terms of said notice.

75 That thereupon said cattle were turned into stock pasture fields and full fed until December 1st, 1881, on corn, and that the value of said corn so fed to them during that time was $9,420.

That on the 15th day of November defendant received written notice from plaintiffs, demanding the cattle, under the written contract of November 3rd, 1880, to be weighed and delivered at Dawsonville, December 1st, 1881.

Said notice was in words and figures, as follows:

"To JOHN S. BILBY:

"You are hereby notified that we will be ready to receive from you, on the 1st day of December, 1881, the cattle, consisting of fifteen hundred head of steers belonging to us, and placed in your keeping under a written contract, dated November 3rd, 1880, and we hereby notify you that on said 1st day of December, 1881, we will demand said fifteen hundred head of steers at your hands.

"November 15th, 1881.

"TEAL & CO."

That in pursuance of said notice defendant commenced to weigh 1,240 of said cattle, on the 1st and 2nd days of December, 1881, and that said 1,240 cattle weighed at that time and place one million five hundred and eighty-four thousand one hundred and sixty-four pounds.

Defendant introduced testimony further tending to prove that plaintiffs disturbed said cattle by building a fire near the pens where the cattle were held on the nights of November 30 and December 1st, 1881, just prior to the days when said cattle were to be weighed, and that by reason of such disturbance the weight of said cattle at the same were weighed, on said first and second days of December, was reduced 25 to 50 lbs. per head.

76 Defendant further introduced testimony tending to prove that said cattle were shrunk before weighing, according to the terms of said written contract, and that after the same were weighed he offered to deliver them over to plaintiffs on the payment in cash by plaintiffs of five cents per pound for all extra weight over and above nine hundred and fifty pounds per head, according to said weights of November 1st, 1881, and on the payment for the care and feed for the same from that time to December 1st, 1881, and for the freights defendant had paid on said cattle from Council Bluffs, which payment plaintiffs refused to make, and demanded said cattle, to the number of fifteen hundred head.

Defendant introduced evidence tending to prove that of the two hundred and sixty-eight cattle that died, defendant took off and preserved the hides of all of them except seventeen. That defendants offered to take off the hides of these, they being frozen, plaintiff Coleman expressly stipulated that defendant need not take off their hides; that he knew they were dead, and that was all he wanted, and that in March, 1881, plaintiff Coleman agreed to count and receive the hides defendant had taken off of the cattle, he then stating he wished to market them, and defendant got them together for

that purpose, but plaintiff afterwards refused and neglected so to do. That defendant had two hundred and fifty-one (251) hides on his farm ready for counting, inspection, and receiving by plaintiffs. That in April, 1881, defendant tendered these hides to plaintiff Coleman, and requested him to count, inspect, and receive them,
76½ which he refused to do. That during the summer of 1881 these hides rotted and became spoiled, without any fault on the part of the plaintiff.

Defendant further introduced evidence tending to show that the market value of said cattle at Dawsonville on the first days of December, 1881, was three and a half cents per pound to four cents per pound, and that the difference in value between the cattle at Dawsonville, Mo., on said first day of December, 1881, which he had weighed and ready for delivery, and the same cattle weighing 1,400 lbs., would not exceed fifty cents per hundred pounds.

The defendant introduced evidence tending to show that there was a market for cattle at Dawsonville, Missouri; that the surrounding country for many miles was very productive and well inhabited, and a large portion of its population was devoting their time to the raising of cattle. That there was a number of cattle buyers at that place, and that the value of beef cattle at that place was the Chicago market price for the same kind of cattle, less freight and the ordinary shrinkage of cattle between those places, occasioned by their shipment. That in the summer of 1881 there was a large demand there for such cattle as those replevined by the plaintiffs from the defendant, for the reason that with the exception of a few of the cattle, which were described in the testimony of the witnesses as "stuck cattle," the others were in a fine condition to be taken and fed for fatted beef cattle, and that the cattle dealers in and around Dawsonville in that season of the year were buying cattle in Chicago, and other markets, and shipping them to Dawsonville for the purpose of selling them to parties in the surrounding country as
77 feeders; that is to say, to be fed until they became fat beef cattle. That such cattle as those replevied by the plaintiffs would at that season of the year have brought more at Dawsonville, and could have been sold to a greater advantage to the cattle men in the surrounding country than they were afterwards sold in Chicago.

Defendant also introduced evidence tending to show that the cattle were recklessly handled by the plaintiffs after they were delivered into their possession by the marshal.

That the commission men in Chicago who handled the cattle did not sell them to the best advantage, and that such cattle would have realized much more if they had been disposed of differently by the plaintiffs and their agents.

Defendant introduced evidence tending to show that when he drove the cattle to Dawsonville, Missouri, he demanded of the plaintiffs that they pay him for the food and care of the cattle while in his hands, and they refused to allow him anything whatever at that time, or at any time.

Defendant introduced evidence tending to show that the plain-

tiffs' 1,500 cattle when delivered to him at Dawsonville, Missouri, were of the value of $26,400.00; that at the time the 1,232 head were taken from the defendant at said place by the marshal they were at least of the value of 62,832 dollars. That between the 1st of November, 1881, and the 1st of December, 1881, they ate 18,480 bushels of corn. That corn was worth between the last said dates at plaintiffs' premises between forty and fifty-eight cents per bushel. That plaintiffs' cattle increased in weight between the last said dates 15 and ½ pounds each.

78 Defendant also introduced evidence tending to show that plaintiffs' cattle while in his care had eaten a great quantity of hay and straw, and during the summer and fall of 1881 had consumed the grass and pasture off of several thousand acres of land, and that at all times, while in his custody, they were herded, guarded, and fed by men employed by him to the number averaging between twenty-five and forty.

Defendant further introduced evidence tending to prove that plaintiffs knew of the manner in which said cattle were handled while they were at Rock Creek station and vicinity in the month of October, 1880, and of the want of feed and water they had suffered from at that place, and the kind of water they had drunk at Rock Creek Valley and Soda Lakes, and of the severe, stormy, and extreme cold weather prevailing there at that time, and of the death of a portion of said cattle from such exposure, want of care, and food and bad water while in that vicinity, and of the delays in shipment of said cattle; and that defendant and said Bass were not informed by plaintiffs of any of said facts, or that defendant or said Bass knew anything thereof at the time defendant received said cattle under said contract, and that defendant at the time he received said cattle supposed they were of an average lot in age, flesh, and quality to the portion of said Teal & Co.'s herd which arrived at Council Bluffs on the 17th day of October, 1880; that the cattle of the sample lot received Oct. 17th, 1880, weighed on an average one thousand and one pounds, and that the thirteen hundred head received by defendant under his contract weighed 1,250,390

79 lbs., an average of 950 lbs. and a fraction, and that the two hundred head of said cattle weighed to defendant with the 1,000 head, weighed 174,650 lbs., an average of 837 lbs. and a fraction.

Defendant further introduced evidence tending to prove that while defendant had said cattle at Dawsonville ready for delivery to plaintiffs from the 2nd to the 7th days of December, 1881, the defendant expected two hundred dollars for feeding said cattle, and that defendant had said cattle fed and watered regularly.

Defendant introduced evidence showing that he paid railroad freight on said 1,500 head of cattle from Council Bluffs, Iowa, to Dawsonville, Missouri, at different times from November 4th to 7th, 1880, to the amount of $1,169.50.

Defendant introduces evidence tending to prove that none of the 1,500 cattle received by him from plaintiffs were lost, stolen, or strayed.

Defendant also introduced evidence tending to prove that prior to the 1st day of December, 1881, that the plaintiffs had entered into an agreement with Wood Bros., cattle commission men, of Chicago, Ill., to turn said cattle over to them upon their, the said Wood Bros., furnishing a replevin bond to enable the plaintiffs to replevy said cattle at Dawsonville, and that said cattle, when replevined at Dawsonville, were then and there turned over to an agent of Wood Bros., who was there for the purpose of receiving them, and that thereafter the plaintiffs had no control over said cattle or their sale.

80 Plaintiffs, in rebuttal, offered evidence tending to prove that the Oregon trail cattle of plaintiffs, while at and in the vicinity of Rock Creek station, in Wyoming, were carefully handled and did not suffer, and were not injured from the use of alkali water in the Seven Miles Springs and Soda Lakes. That said water was of good quality, and used by all the stockmen for their cattle. Bringing Western cattle over the trail and resting them there, and had been so used by the herds for years, and amounting to many thousands of cattle that had been driven to that vicinity in the fall of 1880 without injury to them, but, on the contrary, that said water was wholesome. That Western cattle were used to drinking that kind of water, and that alkali acted like salt on their stomachs, and the cattle could not thrive without it.

Plaintiffs further introduced testimony tending to prove that of said 3,007 of the Oregon trail cattle of plaintiffs, including the drag band, there were shipped from Rock Creek to Council Bluffs, arrived there and sold, or otherwise disposed of by plaintiffs, twenty-nine hundred and ninety-one head, including the fifteen hundred head of defendant, and that the average weight of all of said cattle was 944 pounds per head, and that all of the cattle that died on shipment to Council Bluffs or were down in the cars were of the last shipment of the "drag band," except four or five.

Plaintiffs further introduced evidence tending to prove that no change of the written contract of Nov. 3rd, 1880, was made by plaintiffs.

81 Plaintiffs further introduced evidence tending to prove that defendant had made statements and admissions from time to time after said alleged change of contract tending to prove that said written contract was still in force, according to its terms, and that plaintiffs and defendant acted and operated under their said written contract.

Plaintiffs further introduced evidence tending to prove that of the 260 of said cattle which defendant claimed had died, twenty-six were sold by defendant at different times during the winter of 1880 and spring and summer of 1881, and that others of the cattle were lost or unaccounted for.

Plaintiffs further introduced testimony tending to show said cattle were not injured or damaged in any way by the fire which plaintiffs caused to be built near the pens where the cattle were held on the nights of November 30th and December 1st, 1881; that they did not shrink any in weight from said cause.

Plaintiffs further introduced testimony tending to prove that the general reputation of defendant in the neighborhood in which he lived for truth and veracity, honesty, and fair dealing was bad, and that defendant was not to be believed under oath in a case where he had any pecuniary interest, and that defendant was a dishonest man and a rascal.

Plaintiffs further introduced testimony tending to prove that defendant had not offered or tendered to plaintiffs the hides of the dead cattle or any of them, and that the tender or offer of said hides was not waived by plaintiffs.

82 Defendant then offered evidence tending to prove that his reputation for truth and veracity and fair dealing in the neighborhood where he lived, and also where he was known, was good, and that the witness so testifying would believe him under oath in a matter in which he had a pecuniary interest, and that defendant was an honest man, and not a rascal.

This was all the evidence in the case.

Plaintiffs thereupon prayed the court, in writing, to charge the jury in their behalf, as follows:

1. If Mr. Bass, the referee named in the contract which has been read in evidence, determined that the cattle delivered to and received by Bilby were, as to age, flesh, and quality, such as Bilby was to have under said contract, then Bilby is bound by that determination, unless it has been shown by the evidence that Bass, in passing upon the age, flesh, and quality of said cattle, was influenced by representations made by plaintiffs as to their age, flesh, and quality, and that such representations were false.

But the court, against plaintiffs' objection, then and there refused to so charge the jury, as prayed for in said first instruction; to which action of the court, in refusing to charge the jury as prayed for in said first instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

2. That although the jury may believe from the evidence
83 that the cattle received by the defendant were, in fact, thinner in flesh than the lot which had arrived at Council Bluffs October 17, 1880, yet, if their condition as to flesh was known to defendant at the time he received them, and that, notwithstanding their condition as to flesh, he received them under said contract, it is too late now to complain.

But the court then and there refused to so charge the jury, as requested in said second instruction; to which action of the court in refusing to charge the jury as prayed for in said second instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

3. By the contract read in evidence the defendant undertoook to receive the cattle mentioned therein, and to winter them well on hay, straw, and stock fields until grass should come in the following spring, viz., to feed them well during the winter on hay, straw, and stocks, and keep them in enclosed pastures on good grass until August 15th, 1881, and thereafter feed them all the corn they could eat on each and every day until delivered to plaintiffs; and that if said cattle remained in his possession until Dec. 1st, 1881, to so feed and care for them that their average weight should be increased four hundred and fifty pounds; and that plaintiffs were to pay defendant five cents per pound for their increased weight, and if the jury shall find from the evidence that the defendant did not feed and care for said cattle as he was to do by the said contract, and that, notwithstanding that said cattle remained with him
84 until December 1st, 1881, he did not so feed and care for them that the average weight was increased four hundred and fifty pounds, then, under said contract, the defendant is not entitled to anything for feeding said cattle.

But the court then and there refused to so charge the jury as requested in said third instruction; to which action of the court in refusing to charge the jury as prayed for in said third instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury as follows:

4. By the written contract read in evidence the defendant was bound to account to and pay plaintiffs for each one of the cattle lost, strayed, or stolen, or which died through defendant's neglect or carelessness.

But the court then and there refused to so charge the jury as requested in said 4th instruction; to which action of the court in refusing to charge the jury as prayed for in said fourth instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

5. The contract read in evidence, made November 3rd, 1880, in respect to the cattle in question, must control in this case, unless the same was thereafter modified or changed upon some new consideration; and if defendant relies upon a modification or change of the contract, the burden is upon him to show, by a preponderance of evidence, that such contract was modified or changed.

85 But the court then and there refused to so charge the jury as requested in said fifth instruction; to which action of the court in refusing to charge the jury as prayed for in said fifth instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury furth , as follows:

6. The defendant, in his answer, claims that it was found that said cattle could not be wintered on hay, straw, and stalks, and that the written contract which had been read in evidence was modified by an oral agreement, under which defendant says he was to put the cattle on corn at the time and feed them corn until they had sufficiently recovered from the injuries the cattle had received and had become sufficiently built up, so that those that survived could be fed on hay, straw, and cornstalks, and that the time they were so fed corn in the winter of 1880 and 1881 should be deducted from the time they were to be fed corn during the summer and fall of 1881, and that all right plaintiffs had, under the written contract, to require defendant to so feed and care for said cattle that they would increase on an average four hundred and fifty pounds, should be and was waived; and if defendant relies on such modification of said contract as an excuse for not complying with the written contract, it is incumbent upon him to satisfy the jury, by a preponderance of the evidence, that the contract was so modified, and in determining whether the contract was so modified *and in determining whether the contract was so modified*, the jury should take into con-
86 sideration the testimony in the case as to whether the cattle, up to the time said contract is said to have been modified, had been well fed on hay, straw, and stalks, and whether such feed had proven insufficient to sustain and keep said cattle, and whether defendant was able or prepared to feed them well on hay, straw, and stalks, and whether it was to the mutual advantage of the parties that they should be fed on corn and stalks instead of hay, straw, and stalks, and all the other evidence in the case.

But the court then and there refused to so charge the jury as requested in said 6th instruction; to which action of the court in refusing to charge the jury as prayed for in said 6th instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon prayed the court, in writing, to charge the jury further, as follows:

7. If the defendant failed and neglected to feed and care for plaintiffs' cattle in the manner he was to feed and care for them under the contract between plaintiffs and defendant, in force at that time, and during such time any of said cattle were lost through such negligence of defendant, then he is liable to plaintiffs for what said cattle would have been worth at the time plaintiffs were entitled to have them delivered to them under their contract; that is to say, on the 1st day of December, 1881.

87 But the court then and there refused to so charge the jury as requested in said 7th instruction; to which action of the court in refusing to charge the jury as prayed for in said 7th instruction plaintiffs at the time then and there duly excepted, and still except

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

9. It was the duty of the defendant under the written contract in evidence, if the same was not altered, to preserve the hides of all cattle which died while the cattle were in the custody of the defendant under said contract, until December 1st, 1881, and also the ear marks of all such dying as had ear marks. The hides and ears, if thus preserved, would, however, be evidence of the death of such cattle only, and not of the cause or manner of their death, nor would they show that any such cattle died from causes unavoidable on the part of the defendant.

But if the jury believe from the evidence that said hides were not preserved by defendant for exhibition to plaintiffs December 1st, 1881, and that such preservation and exhibition was not waived by any of the plaintiffs, then the burden is on the defendant to show to the satisfaction of the jury by a preponderence of evidence, both how many of said cattle died and that their deaths resulted from causes unavoidable on the part of defendant, and for all dying which are not accounted for defendant is responsible to plaintiffs.

88 But the court then and there refused to so charge the jury as requested in said 9th instruction; to which action of the court in refusing to charge the jury as prayed for in said 9th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

10. In case No. 409 it is admitted by the pleadings that defendant received of plaintiffs the fifteen hundred head of cattle mentioned in the contract, fed and weighed at Council Bluffs, and delivered to defendant at Dawsonville, Missouri, in the manner stipulated in said contract.

If, therefore, the jury believe from the evidence that said written contract was never modified as to any of its terms by any oral contract subsequently entered into between plaintiffs and defendant, then, after the receipt of said cattle by defendant, if they were the same cattle as those which had been driven by plaintiffs in the year 1880 from Wasco county, Oregon, to Rock Creek, in Wyoming Territory, and were similar in age, flesh and quality to a train load which arrived at Council Bluffs, Iowa, Sunday, October 17th, 1880; and if the jury further believe from the evidence that defendant failed or neglected to winter said cattle well on hay, straw, and stalk fields through the winter next ensuing the receipt of said cattle until grass came in the spring of 1881, and in other
89 respects failed or neglected to care for said cattle as a man of ordinary experience and prudence would care for his own cattle of the same breed and kind through said wintea on like feed; or if defendant, after grass came in the spring of 1881, failed or neglected to keep said cattle on good grass in an enclosed pasture for any period from that time until August 15th, 1881; or if defendant, for any portion of the time between August 15th and December 1st, 1881, failed or neglected to feed said cattle all the corn

they could eat, then defendant is responsible to plaintiffs for all cattle which died in consequence of such neglect or failure.

Defendant is also responsible absolutely for all of said cattle which were lost or which strayed or were stolen, whether through his negligence or in any other way, and for all cattle which he purposely or accident-ly took and converted to his own use.

Defendant is also liable absolutely, without regard to his neglect or careless treatment of the cattle, for all loss to plaintiffs occasioned by the failure of defendant to so feed and care for the cattle which survived and were received by plaintiffs as to make them increase in weight each four hundred and fifty pounds, provided that in estimating damages in case 409 the jury will not take into consideration any loss by death or deterioration in weight or value of said cattle after December 1st, 1881.

90 But the court then and there refused to so charge the jury as requested in said 10th instruction; to which action of the court in refusing to charge the jury as prayed for in said 10th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

11. In estimating the damages, if any, to which the jury may believe from the evidence plaintiffs are entitled, in case 409, for cattle lost, strayed, and stolen and taken and converted by defendant to his own use, and cattle which died through the neglect or carelessness of the defendant, or of his agents or employees, while defendant kept said cattle, from the time he first received them until December 1st, 1881, the jury will allow plaintiffs as the value of said cattle what they would have been worth alive at Dawsonville, Missouri, December 1st, 1881, had they been increased in weight four hundred and fifty pounds on an average over and above what they averaged when defendant first received them.

But the court then and there refused to so charge the jury as requested in said 11th instruction; to which action of the court in refusing to charge the jury as prayed for in said 11th instruction plaintiffs at the time then and there duly excepted, and still except

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

91 In estimating the damage, if any, which the jury may believe from the evidence plaintiffs are entitled to, in case 409, under the written contract read in evidence, if they believe said contract was not altered by a subsequent oral agreement between plaintiffs and defendant, the jury will find the difference between what the cattle living and received by plaintiffs were worth at Dawsonville, Missouri, December 1st, 1880, as weighed by defendant, less what the increased weight put on them was reasonably worth, and what said cattle would have been worth there, weighed in the manner specified in said written contract at said date, if they had

been increased in weight four hundred and fifty pounds each on an average above what they weighed when defendant first received them under said contract, less five cents per pound on their increase, and this difference, if in favor of plaintiffs, the jury will allow them as part of their damages.

They will further ascertain from the evidence what number of the cattle received by defendant under said written contract were lost, strayed, and were stolen and converted by defendant to his own use, and what number died through the neglect or carelessness of defendant, or of his agents or employees, while said cattle were in defendant's custody, under said contract, up to December 1st, 1881, and they will find what would have been the value of all such cattle at Dawsonville, Missouri, December 1st, 1881, had they at that time and place been delivered alive, and allow such
92 value to plaintiffs as part of their damages.

But the court then and there refused to instruct the jury as requested in said 12th instruction; to which action of the court in refusing to charge the jury as prayed for in said 12th instruction plaintiffs at the time then and there duly excepted and still except.

Plaintiffs thereupon prayed the court, in writing, the court to charge the jury further, as follows:

13. The defendant in case No. 409 in his answer sets up an oral agreement made and entered into by and between himself and the plaintiffs, on or about the 15th day of December, 1880, by which defendant claims that the written contract dated November 3rd, 1880, read in evidence, was modified in this, that in consideration of the bad condition of the cattle the time they were received by defendant under said written contract, and by reason of the bad treatment and injury done to them before they were received by defendant, it was agreed that defendant should, in the winter of 1880 and 1881, feed corn to said cattle, and that the time during which he should so feed them corn should be deducted from the latter part of the time they were to be kept on full feed of corn under said written contract, and that defendant was to be discharged from his obligation under his written contract to increase their weight four hundred and fifty pounds each, on an average,
93 if they were left in his custody until December 1st, 1881.

The court instructs the jury that before they can believe in the existence of such new oral contract all its terms and conditions must be clearly established by a preponderance of evidence on the part of defendant. Such oral contract must also be founded upon some new and sufficient consideration, and if the jury believe from the evidence that the defendant after he first received said cattle failed to feed them on hay, straw, and stalk-fields as much as they could eat, as he bound himself to do, by said written contract, and otherwise failed to treat them with ordinary care and prudence, whereby the necessity to feed them corn was brought about by his own wrongful acts, or if he fed them corn merely to supply the de-

ficiency of the hay, straw, or stalks which he was to feed them, or if he fed them corn of his own volition, for any purpose, and without any express agreement between him and any of the plaintiffs to feed them corn with a view to change the manner or time of feeding them as fixed by said written contract, then, in either of these cases, the fact that defendant fed said cattle corn at different times during the winter of 1880 and 1881 would not afford a sufficient consideration for the alteration of said written contract, nor discharge defendant from his obligation to feed them corn as stipulated therein.

But the court then and there refused to charge the jury as
94 requested in said 13th instruction; to which action of the court in refusing to charge the jury as prayed for in said 13th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

14. The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and may give to the testimony of every witness such weight as they deem it entitled to, and if they believe that any witness has willfully testified falsely to any material fact in controversy on the trial of this case, they are at liberty to discharge the whole of the testimony of such witness.

But the court then and there refused to so charge the jury as requested in said 14th instruction; to which action of the court in refusing to charge the jury as prayed for in said 14th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiff thereupon further prayed the court, in writing, to charge the jury further, as follows:

17. Should the jury find for the plaintiffs under the foregoing instructions they may take into consideration the sum of one thousand dollars paid to defendant by plaintiffs on September 1st, 1881, in arriving at the amount of damages due to plaintiffs.

95 But the court then [and] there refused to so charge the jury as requested in said 17th instruction; to which action of the court in refusing to charge the jury as prayed for in said 17th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

18. Before the defendant can set up and oral agreement to alter the written contract read in evidence, and to avail him as an excuse for the non-performance of said written contract, he must not only clearly establish the existence and terms of such oral contract, but he must also show that he has duly performed all the terms and conditions thereof required to be performed on his part. He cannot violate it and then claim the benefit of it.

But the court then & there refused to charge the jury as requested in said 18th instruction; to which action of the court in refusing to charge the jury as prayed for in said 18th instruction plaintiffs at the time then and there duly excepted, and still except.

96 The court thereupon charged the jury as follows:

Let us, in the first place, bring before our mind the several parties, plaintiffs and defendant to the suits. We find from the testimony in the cases that four gentlemen, Teal, Coleman, Todd, and Storrs, residing in the State of Oregon, in the spring of 1880, formed a copartnership for the purpose of driving about 3,000 head of cattle which they owned eastward, to dispose of them in such a manner as to them seemed best. The partner Teal seems to have kept in person and through his son a general supervision of these cattle, besides conducting the financial concerns of the company. The partner Storrs took but little personal interest, while the partners, Coleman and Todd, had the actual control and handling of the cattle from the time they left Oregon until they arrived at Rock Creek, on the Union Pacific railroad, in Wyoming Territory, from which place they were transported by rail to Council Bluffs. The monied interest which the several partners had in the venture were, Teal, one-third; Coleman, one-third; and the two partners, Todd and Storrs, one-third jointly. The partners, it appears, were buyers, drivers, and dealers in cattle.

On the other hand, we have Bilby, residing near Fairview, in Nodaway county, in the State of Missouri. He is a farmer on a large scale, a raiser, feeder, and dealer in stock, a merchant, and having ample means to carry out the agreement he entered into with Teal & Co. These parties, plaintiffs and defendant, on the 3rd day
97 of November, 1880, entered into the written agreement in evidence. The object of this agreement, so far as it can be gathered from its terms, seems to have been, on the part of Teal and Co., to have 1,500 of the cattle driven from Oregon to Rock Creek and shipped to Council Bluffs, taken care of and fed during the winter of 1880 and 1881 and the summer and fall following, in such a manner as to secure an average weight of 1,400 pounds each, in case they were left with Bilby up to the 1st of December, 1881. Bilby, on his part, seems to have entered into the contract for the purpose of realizing a reward of five cents per pound for every pound of flesh he put upon the cattle by feeding them. The parties to the contract are brought together by Bass, a partner of the cattle firm of Rosenbaum, Bass & Co., at Council Bluffs, Iowa, and a preliminary agreement is entered into by Bilby with the son of Teal, providing that Bilby should take 1,500 of the cattle driven to Rock Creek, such cattle to be "similar" in age, flesh, and quality to a train load that arrived at Council Bluffs, Iowa, Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., is made the judge of the cattle, whether or not they are an average lot with the train load that arrived on Sunday, October 17th, 1880. If the quotation here made from the contract was not fully agreed on between Bilby and the son of Teal, it resulted in what is now found to be the con-

tract in suit. Bilby had seen the cattle which were to be the sample lot.

98 After this preliminary understanding between the son of Teal and Bilby the son proceeds to Rock Creek, and on the 3rd day of November, 1880, Teal, Senior, and Bilby meet at Council Bluffs, and the contract in evidence is agreed on and signed by the parties. On the same evening, or the next day, 1,300 of 1,500 head of the Bilby cattle passed on by Bass were weighed and shipped from Council Bluffs to Dawsonville, Bilby going with one of the shipments. Under the contract the cattle are "to be delivered to John S. Bilby, at Dawsonville, Missouri." And it is further agreed that "if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said amount and the amount to be paid on delivery of cattle to J. Teal & Co." The cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to.

During the winter of 1880 and the summer and winter of 1881, Coleman, one of the partners, is found more or less with the cattle. The written contract between Teal and Bilby provides that Bilby "agrees to take these cattle and winter them well on hay, straw, and stock fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat

99 until delivered to J. Teal & Co." It is claimed by Bilby that in the first half of December, 1880, the stipulations and conditions of the contract last quoted were, by verbal agreement between himself and Coleman, so charged that the cattle were to be fed of corn during the winter of 1880 and 1881, and that in consideration of Bilby's doing so he was to be released from the stipulated weight of 1,400 pounds, and as a further consideration that the time which he so fed corn in the winter of 1880 and 1881 was to be deducted from the time which Teal & Co. may leave the cattle to be fed, namely, the first of December, 1881. Under the contract Teal and Co. agree "to advance one thousand ($1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to payment of weights added to cattle on the last delivery." The amount thus stipulated for was paid by Teal & Co., and one receipt endorsed on the contract which Teal had made, in addition thereto, a separate receipt given.

A notice was served by Bilby on Coleman, notifying him that on the 31st day of October, 1881, he would proceed to weigh the cattle for the purpose of delivering them on payment of dues for care and feeding, as he, Bilby, claimed he had a right to do under the verbal contract made between himself and Coleman, modifying the written agreement. Nothing was done under this notice except the weighing on the 31st day of October, 1881, of which Teal & Co. took no

100 notice. On the first day of December, the day fixed in the written contract for the delivery, Teal & Co. demanded their 1,500 head of cattle of Bilby; 1,229 or 1,232 of the cattle were weighed on the 1st and 2nd of Dec. and driven to Dawsonville, and after being

held there some days by Bilby were taken by a writ of replevin issued from this court, and the possession of them delivered to Teal & Co. on their giving bond. The matter thus got into the court, and the action known as the replevin suit commenced. In this action, Teal & Co., as plaintiffs, allege that they are the owners of the 1,500 head of cattle in the controversy, and that Bilby wrongfully retains them, to their damage 25,000 dollars. They, Teal & Co., by Joseph Teal, one of the partners of Teal & Co., and a plaintiff in this action, makes an affidavit swearing the 1,500 cattle are worth 75,000 dollars, that they are wrongfully detained by Bilby, and that they (Teal & Co.) will be in danger of losing their said property unless it be taken out of the possession of Bilby or otherwise secured. Without such an affidavit Bilby could not have been deprived of the possession of the cattle. To this action Bilby appears and answers that Teal & Co. are not entitled to the possession of the cattle; that the same were delivered to him by Teal & Co. to be fed and cared for; that 268 of the cattle died without any fault or negligence on his part; that he continued to feed and care
101 for the rest until the same were taken from him by virtue of the replevin suit. That he is entitled to 30,000 dollars for feed and care of the cattle, except 1,000 dollars paid; that he is entitled for moneys laid out for freights paid, and asks judgment for damages, money laid out and a return of the cattle. In this action (replevin) the question is, who is entitled to the possession of the cattle? The ownership not being disputed, the solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and the money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained, under the evidence, by the detention of the cattle from them after the first day of December, 1881, and until they are delivered to them by the U. S. marshal. If, on the other hand, Bilby is entitled to pay for feed and care of the cattle, they must be returned to him, and he (Bilby) is entitled to the damage he has sustained in consequence of the cattle being taken out of his possession, namely, the trouble and expenses for feeding and caring for them at Dawsonville, as hereinafter further explained. Your allowing of damages in the replevin suit, if you find the issue therein for Bilby is limited as stated, and you cannot allow general damages for the feeding and caring for the cattle, such damages, if any, you are authorized to pass on the second suit between
102 the same parties and growing out of the same contract, to which your attention will now be called.

In this the 2nd suit, the plaintiffs allege that they were the owners of 1,500 cattle, and that, being desirous of having said cattle properly cared for during the winter, spring, and summer of 1880 and 1881, they entered into a contract in writing with Bilby to keep the same for them; that they weighed the cattle to him, and he received them; that the average weight thereof was 950 pounds; that they paid Bilby $1,000 on the first day of August, 1881, as agreed on, and that plaintiffs have fully kept their part of the contract. The

plaintiffs in their suit further aver that if said cattle had been well kept, as provided in the contract, up till the first day of December, 1881, they would have increased in weight on an average 450 pounds per head, and that Bilby had agreed to so feed them that they would come up to this average, and that they would have been worth 98 dollars per head to the plaintiffs. They next proceed to state that Bilby failed to keep the cattle as agreed, and that on the 1st day of December he refused, on plaintiffs' demand, to deliver them up, and they have been compelled to bring the replevin suit; that the increased weight of the cattle taken from the defendant average three hundred and twenty-six pounds, and that the cattle were worth forty-four dollars per head only. Plaintiffs further allege
that Bilby failed to deliver 271 head of the 1,500 head of
103 cattle delivered to him, and that the cattle not delivered were worth twenty-six thousand dollars. Teal & Co. claim that they have been damaged by Bilby not keeping his contract in the sum of 92,366 dollars, for which they ask judgment against Bilby.

The petition of plaintiffs in the suit set out more at length and in detail the various failures of Bilby to keep his contract, and you may refer to it for omitted specifications, so many of them have been cited only as will enable me to intel-igently speak of their claims.

To this action the defendant Bilby answers, by first denying all the allegations of the plaintiffs' petition, and he next proceeds to declare the facts to be, that he entered into the contract for the keeping of the 1,500 cattle of plaintiffs; that the cattle were to be similar in age, flesh, and quality to those which arrived on the 17th day of October, 1880, which Bilby had examined; that he, Bilby, relied on the representations as to the conditions of the cattle made by the plaintiffs, and was thus induced to enter into the contract, and agree that Bass, a partner of the cattle firm of Rosenbaum, Bass & Co. at Council Bluffs, should be the judge as to whether the cattle to be turned over to him were up to an average as compared with the sample lot; that the cattle delivered were not in fact up to the aver-
age, though so represented to be by plaintiffs and said Bass;
104 that the cattle had been snowed in and detained at Rock Creek, from the 17th to the 30th of October; that they had been starved until many of them died, and others so frozen and injured that they never fully recovered, of which facts as stated the defendant and Bass were ignorant, and were concealed by plaintiffs from defendant and said Bass; that the treatment the cattle received was the cause of many of them afterwards dying; that though they were carefully shipped, handled, and cared for, two hundred and sixty-eight of them died, and none of them strayed or were stolen, and none died through the neglect or carelessness of defendant, but that they died from unavoidable causes. Defendant Bilby further alleges that he complied with the contract regarding the preservation of the hides as evidence of the death of such of the cattle as had died, and that he tendered the hides as agreed between plaintiff Coleman, and that since the hides had spoiled. Defendant next set out the amounts of money advanced by him for plaintiffs to pay freight of cattle to Dawsonville, and claims payment thereof, with interest.

Defendant next proceeds to set up a verbal agreement that the defendant should put the cattle on corn, and that in consideration of so doing the time the defendant should so feed was to be deducted from the time the cattle were to be fed corn in the fall, and as a further consideration
the defendant was to be released from the written contract to in-
105 crease the weight of the cattle 450 pounds. The defendant next alleges that in conformity to the verbal agreement he put the cattle upon corn 75 days, and that on the 27th of September he notified plaintiffs that their cattle were ready for delivery, to which plaintiffs paid no attention, and that in conformity to the notice he weighed the cattle, and that they weighed 1,553,305 pounds; that on the 15th day of November, 1881, defendant received notice from plaintiffs that on the 1st day of December, 1881, they would be ready to receive the 1,500 head of cattle belonging to them; that thereupon defendant made arrangements for weighing and delivering of said cattle; that while doing so plaintiffs caused the cattle to be disturbed, to his, defendant's, injury in the sum of 2,245 dollars. That defendant next proceeds to state that he had 1,232 head of cattle on the 2nd day of December, 1881, at Dawsonville, ready for delivery, and willing to deliver the same on payment of the amount due him for caring and feeding of said cattle, the amounts advanced for freights, and the injury done him by disturbing the cattle before weighing, amounting in all to $29,136.62. Defendant further states that plaintiffs refused to pay him his just demands and receive the cattle, and that, in consequence, the cattle were kept at Dawsonville up to the 9th day of December, 1881, when they were
taken out of his possession by the U. S. marshal under a writ
106 from this court and delivered into the possession of plaintiffs.

With the outlines of the allegations of plaintiffs in their suit for damages, and the outlines of defendant's answer thereto and his allegation as to the modification of the written contract by verbal agreement before us, we can enter upon the consideration of the law as applicable to the facts, which I shall now proceed to do.

And, first, of the written contract. It has already been said that its object, as deducted from its provisions, must be declared to have been the taking care of and feeding of the cattle, so as to increase their weight from 950 pounds to 1,400 pounds per head; in other words, add 450 pounds, as provided in the written contract. The plaintiffs, in their statement of the case, say that the increase of weight spoken [of] was for the purpose of making them marketable, and that in consequence of their not being marketable at 1,276 pounds, losses, aside from the deficiency in weight, has been incurred by them. The contract is silent as to what was to be done with the cattle after they were fed, and hence the alleged intended manner of dealing with — by the plaintiffs can have no bearing in the matter. You may well come to the conclusion from the evidence that the plaintiffs, if they had received the cattle in the order anticipated, they would have dealt with them as their interests would have suggested, put them on the market for beef, in whole or in part, or still further feed them.

107 The existing market, its future prospect as to rise or fall, the cost of longer feeding them, might all have constituted factors in their determination as to what they would have done with the cattle. Enough; the contract says nothing about the future of the cattle, and it would be idle for you to speculate about it. The written contract provides that Bilby's cattle were, on an average, to be similar to a lot of the Teal herd, which had arrived on the railroad on the 17th day of October, in age, flesh, and quality; and Bass, a member of the cattle firm of Rosenbaum, Bass & Co., which firm handled the Teal cattle on commission, was made the judge as to whether the cattle of Bilby's came up to the average of the sample lot. It may have been unfortunate on the part of Bilby to have agreed to an arbitrator who was in the interest of Teal, by way of commission in the cattle on which he was to pass; yet that was for Bilby to determine, and he cannot complain of the acts of Bass, if honestly discharged by him. It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full possession of the knowledge possessed by them, and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred through careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such

108 a case the plaintiffs were bound, if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action. Bass, under the contract, was to judge of the age, flesh, and quality of the cattle between the parties, as already stated, but he was not made the judge as to the manner in which the cattle were to be weighed, that being stipulated for in the written contract. Under it the cattle arriving before noon of any one day were to be cut off from food; in other words, put upon shrinkage the same day in the evening at 7 o'clock, and remain without food or water until 7 o'clock the following morning, when they were to be weighed. Cattle arriving after noon of any one day are to be cut off from food and water on the evening of the following day. It is apparent from these provisions of the written contract that the cattle were not to remain in the stock yards on feed longer than was necessary to put them upon shrinkage, as stipulated. The provisions here cited Bass, who had the handling of the cattle, had not a right to change. He had nothing to do with them, except to see that they were complied with. If the cattle were kept in the stock yards on food longer than necessary to put them upon shrinkage, or if the cattle were not cut off from food and water, as provided in the contract, and this occurred without the knowledge and consent of Bilby, and he (Bilby)

109 was damaged in consequence thereof, he is entitled to recover such damage in this action as he has shown by the evidence he has suffered. Bilby could waive the conditions as to feeding before weighing the cattle, or not insist on them; and if he knew that the contract was violated in this respect, you may infer such waiver

if he failed to protest. Bilby had a right to presume that Bass would do his duty in the premises, and was not bound to see to it that he (Bass) did as required by the contract. It is only from Bilby's knowing the violation and not objecting that the inference of waiver spoken of can be drawn.

The written contract provides "that Bilby shall take the cattle and winter them well on hay, straw, and stalk fields until grass comes; to keep in enclosed pastures, on good grass, until the 15th day of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co." The provisions as to wintering them well on hay, straw, and stock fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonable good condition. Bilby was not thereby prevented from feeding them on grass, dry or green, or corn even, or partly substitute such food for the food named in the contract, so that the object, the
110 keeping of the cattle in reasonably good order, was secured. It will not do to stick in the bark in expounding the contract, for if you did, what would have become of these cattle? There are no provisions in the contract for watering them. Yet no one has contended that they were not to be watered. It belongs to the keeping and caring for them. The cattle are to be kept on good grass, in enclosed pastures. The object of the latter provision, no doubt, was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time, when such prairie is found to be fenced all around, except the road openings, is a compliance with the provisions of the contract.

Another provision of the contract is "that Bilby is to be responsible for all cattle lost, strayed, or stolen; and for any dying through the neglect and carelessness of the said John S. Bilby, and dying through causes which are unavoidable, shall be shared thus: J. Teal & Co. to bear the loss of the steer, and John S. Bilby the feed. If any steer die, John S. Bilby shall preserve the hide as evidence of death, and the ears, if there are any ear-marks." I remember no evidence of any of the cattle having strayed or having been stolen. If there is evidence of any of the cattle having been lost, strayed, or stolen without having been recovered, Bilby is liable for such to the plaintiffs.

111 Of the missing or lost ones, if any, I shall speak further hereafter. If any cattle die through unavoidable causes, plaintiffs to lose the steer and Bilby the feed. What are unavoidable causes? They may [be] said to be the incidents which occur over which the party has no control.

Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to the plaintiffs. It was

suggested in argument and shown that more or less of Bilby's cattle were running with and were taken care of the same as the Teal cattle. This testimony must be considered with reference to the condition of the cattle. Strong cattle may get along with and do well with treatment under which weaker would suffer. The distinction here drawn had special application to the watering of some of the cattle.

Bilby, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.

112 There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made, as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted, and the reasonable construction thereupon is that the hides preserved should be counted at the time, and with a view of making the hides themselves available for use or sale.

We have thus passed over the written contract between the parties. Such portions as have not been considered will be touched upon in the examination of the claimed verbal agreement, by which the written contract is alleged to have been modified. This modification is set up by Bilby, and he is bound to prove it. The written contract speaks for itself, and must prevail, unless a change and modification of its terms are proven to your satisfaction.

113 In attempting to arrive at a satisfactory conclusion regarding the modification or change of the written contract a natural inquiry is, Was there a reason or necessity for the change? The parties alike interested in the preserving of cattle were upon the ground. The cattle were dying in large numbers from some cause. Would a change of food suggest itself to meet the contingencies? If so, there would be a reason and motive for the change. A contract is claimed by Bilby to have been made changing some feature of the existing written contract. Bilby affirms that change. Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change, to whom he, Bilby, repeats the argument in the presence of Coleman, and the witness testifies to the change in court. A number of the witnesses testify that the cattle were put on corn about the time of the claimed change. The rest of the testimony bearing on the question consists of acts and admissions claimed as made by the parties to the

modification, and is for and against the change. From the testimony pertaining to it you must determine, first, whether there was any change; and if you find that a change was made, what that change was. If you find that there was no modification or change, then the written contract remained in full force. If you find there was a modification or change of the written contract by the verbal agreement as claimed by Bilby, in that case you will proceed
114 to inquire what was done under it. And here the question arises, Did Bilby live up to the change or modification, if it was made? Though you may find that a modification of the written contract was made by the verbal agreement, as claimed by Bilby, yet if he, Bilby, did not live up to and comply with the change made, he cannot have the benefit of it. You will observe that the change in the written contract, if made, brings up the question whether Bilby shall be paid for the care and expenses of feeding the cattle from the time of weighing them, under the notice given to Coleman, or shall he be satisfied with the additional weight put upon the cattle afterwards, as shown by the December weight. It is obvious from the testimony that the additional weight put upon the cattle between the two weighings did not pay the expenses the cattle caused. If, under the new agreement, the plaintiffs were bound to take the cattle at the time of notice and first weighing, in that case Bilby will be entitled to the expenses of feeding them after the first weighing in December, deducting therefrom the value of the increased weight between the weighings.

Regarding the attempt to impeach the character of Bilby for truth, veracity, honesty, and fair dealing, it may be remarked that plaintiffs had the right to show that Bilby, who testified in the case, could not be believed on oath. It is usual when such attempts are made to stop here; but plaintiffs went further, and undertook to
115 show also that he, Bilby, is dishonest. How he, Bilby, met these charges you heard, and are able to determine the question whether his testimony shall be affected thereby. While this far everything is legitimate and proper, there is one view against which I warn you. This view is that the attempt to attack the honesty of Bilby should not be allowed to affect your mind, if at all, further than as related to this case. A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action, yet you are a rascal, and therefore I am entitled to receive a judgment, and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony.

Having thus reviewed the law as applicable to the testimony at some length, what remains to be done is to present to you the theories and claims of the parties in each of the cases. Both suits, the replevin suit instituted on the first of December, 1881, and the suit upon the contract for damages brought on the 23rd of December, 1881, are suits in which Teal & Co. are plaintiffs and John S. Bilby is the defendant. In the first of these suits, the action of the replevin, the plaintiffs seek to recover the possession of the 1,500 head of cattle which they delivered to Bilby for the purpose of feeding.

There is no dispute as to the title of the cattle, they belonging to Teal & Co.

116 Bilby claims the possession as rightfully belonging to him until he is paid for the care and expenses he has been at in feeding and caring for the cattle. The claim made by defendant is denied by plaintiffs, they virtually saying you, the defendant, have no such rightful claim, but under the pretense of it wrongfully withhold the possession of the cattle from us. Now, if you shall find from the testimony, and under the instructions of the court, that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first, the replevin suit, for the plaintiffs, and assess damages in their (pl'ffs') favor sufficient to cover losses incurred by being deprived of the cattle from the first of December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.

But if, on the other hand, you shall find from the testimony, and under the instructions as given you by the court, that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case you are instructed to find the issue in the replevin case for the defendant, and assess his damages in an amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Daw-

117 sonville from the 2nd day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin.

In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and the damages as stated. The determination of the amount of damages sustained by one or the other of the parties as to the treatment and caring for the cattle is the subject-matter of the controversy in the second suit, the suit for damages on the contract.

The allegations and claims of plaintiffs in the second suit—the suit on the contract for damages—summarized are that the plaintiffs have performed all the agreements and undertakings of the contract on their part, but that the defendant has failed to keep and perform his part, whereby plaintiffs have been damaged to the sum of 92,366 dollars.

To this second, the damage suit on the contract, the defendant answers, summarized, alleges that the written contract as originally made was afterwards, by a verbal agreement, modified and changed, and that he has performed all his agreements and understandings under the contract modified; that he is entitled to compensation for the care and feeding of the cattle and to monies laid out and expended for plaintiffs for freight, and asks for a judgement in the sum of $51,981.62.

118 It remains for me to instruct you regarding the rule for assessing damages. Much has been properly said about weights of cattle because it helps us in arriving at the value of the cattle, for that is the real question. The price per pound of cattle of various weights and in different conditions has been considered,

because this may aid us also in arriving at the true value of the cattle. Under the claims made by the plaintiffs, and assuming that the written contract under which they claim has not been modified, they would be entitled to the difference in value between the cattle weighing on an average 1,400 pounds and cattle weighing on an average 1,276 pounds, if there be any difference in value. The defendant Bilby would also be liable for the number of cattle not properly accounted for, valued at the value of a 1,400-pound steer. Whatever value you fix on the cattle must be fixed with reference to the value of cattle then on the 1st day of December, 1881, at Dawsonville. Under the written contract the plaintiffs are entitled to the hides of the cattle which unavoidably died. Unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them, there is no proof before you as to the value of the hides, *as* and in order to recover their value the plaintiffs would have to show it; the hides seem to be out of the question even if defendant's tender was invalid.

119 The foregoing is the claim of the plaintiffs for damages, and they will be ascertained by you under the evidence and the instructions of the court as given you in the manner stated, if the written contract has not been changed or modified.

The claims of the defendant are as follows:

Assuming the written contract to have been modified, and that defendant performed his contract as modified, he claims for the increased weight of the cattle from 950 to 1,276 pounds. He further claims that under the modified contract he had a right to turn over the cattle on the first day of October or earlier, and asks pay for feeding and caring for the cattle from the first day of October, when he tendered them, to the first day of December, when he drove them to Dawsonville, deducting therefrom the value of the increased weight between the two weighings. He also claims for money advanced for and on account of freight charges advanced on the cattle, with interest at 10 per cent. from the date of payment. If you find any amount due from plaintiffs to defendant, defendant is entitled to interest for the amount you may find due him from the time the possession of the cattle was taken from him to this day at six per cent.

You will have to find a verdict in each of the cases. The forms of the verdict will be prepared and handed in time for you to fill them up in conformity to your findings.

120 I desire to modify the instruction regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant has in the cattle.

You are further instructed that if you find the issue in 409—the damage suit—for the defendant, you will merely say so in your verdict.

The court thereupon, in said charge, against plaintiff's objections, then and there charged the jury therein, as follows:

The cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to.

To which action of the court, as last aforesaid, in giving said charge so objected to, plaintiffs at the time objected, because it was assumed in said charge, as a matter of fact, as proven by the evidence, that said cattle were "taken care of" by defendant on their arrival at Dawsonville, when there was evidence in said cause tending to prove that said cattle were not taken care of at that time and place, but were suffered to remain there without food or water, and were then and there otherwise damaged by the want of proper care on the part of defendant.

Which objections were by the court overruled, and the
121 jury charged as aforesaid; to which action of the court in so charging the jury as last aforesaid plaintiffs at the time then and there duly excepted, and still except.

The court thereupon, against the objections of plaintiffs, in said charge, then and there further charged the jury, as follows:

In this action (replevin) the question is, who is entitled to the possession of the cattle, the ownership not being disputed. The solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained under the evidence by the detention of the cattle from them after the first day of December, 1881, and until they were delivered to them by the U. S. marshal.

To which action of the court, as last aforesaid, in so charging the jury said charge so objected to, plaintiffs objected at the time, on the ground that said charge authorized the jury to find, in said replevin suit, for the defendant, on account of feed and care of the cattle, and for the money charged to have been expended, without requiring the jury to deduct therefrom the damages which the evidence tended to prove plaintiffs had sustained by reason of defendant's
122 failure to feed and care for all of the fifteen hundred of said cattle under the contract in evidence. In case the jury should find, from the evidence, that plaintiffs had sustained such damages, and because the jury were restricted from finding said damages for plaintiffs, and because said charge did not submit the issues between the parties in said action to the jury.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in so charging the jury plaintiffs at the time duly excepted, and still except.

The court thereupon, in said charge, further charged the jury against the objections of plaintiffs, as follows:

If, on the other hand, Bilby is entitled to pay for feed and care of the cattle, they must be returned to him, and he, Bilby, is entitled to the damages he has sustained in consequence of the cattle being taken out of his possession, namely, the trouble and expense of feeding and caring for them while at Dawsonville, as hereinafter further explained.

To which action of the court in giving to the jury said charge so objected to plaintiffs at the time objected, as last aforesaid, and for the further reason that the measure of damages for the taking of said cattle out of defendant's possession is incorrectly given to the jury in said charge last aforesaid.

123 Which objections were by the court overruled, and the jury so charged as last aforesaid; to which action of the court in so charging the jury as last aforesaid against plaintiffs' objections plaintiffs at the time duly excepted, and still except.

The court thereupon, in said charge, against plaintiffs' objections, further charged the jury, as follows:

The written contract provides that Bilby shall take the "cattle and winter them well on hay, straw, and stock-fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co." The provisions as to wintering them well on hay, straw, and stalk-fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonable good condition. Bilby was not thereby prohibited to feed them on grass, dry or green, or corn even, or partly substitute such food for the food named in the contract, so that the object, the keeping of the cattle in reasonably good order, was secured.

124 To which action of the court in so giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that by the terms of the written contract between plaintiffs and defendants, and as the same were given by the court to the jury, defendant was bound to take these cattle and winter them well on hay, straw, and stalk-fields, and that plaintiffs were entitled to a strict and full compliance with the terms thereof. That the interpretation of said contract given and authorized by the jury in said charge is contrary to the terms of said contract and to the law thereof, and that it was the duty of the court and not the jury to construct the terms of said contract, and that said charge is erroneous, because it authorizes the jury to construct said contract and to find a compliance therewith on part of defendant, contrary to its terms and true intent and meaning.

Which objections were by the court overruled and the jury so charged as last aforesaid; to which action of the court in overruling said objections and in so charging the jury as last aforesaid plaintiffs at the time then and there duly excepted, and still except.

The court thereupon in said charge then and there further charged the jury against plaintiffs' objection, as follows:

It will not do to stick in the bark in expounding the contract, for if you did, what would become of these cattle? There are no

125 provisions in the contract for watering them: yet no one has contended that they were not to be watered. It belongs to the keeping and caring for them.

To which action of the court in then and there so giving to the

jury said charge so objected to plaintiffs at the time objected, for the following reasons:

That the construction of said contract given in said charge and authorized by the jury is erroneous, and contrary to the terms and provisions of said contract; that plaintiffs are entitled to compliance with said contract according to its terms and provisions, and the jury are authorized to so expound said contract as to find a compliance therewith contrary to the terms thereof and from a violation of said contract; that by said charge the jury are authorized to expound the provisions of said contract, which it is the province of the court to construe and not of the jury, and that said charge is erroneous, misleading, and prejudicial to plaintiffs. Which objections were by the court overruled, and the jury so charged as last aforesaid.

To which action of the court in so overruling said objections and in so charging the jury plaintiffs at the time duly excepted, and still except.

The court then and there, in said charge, against plaintiffs' objections, further charged the jury, as follows:

126 The cattle are to be on good grass, in enclosed pastures. The object of the latter provision no doubt was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time when such prairie is found to be fenced all around, except the road openings, and these guarded, is a compliance with the provisions of the contract.

To which action of the court in so giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that the construction placed upon the provisions of said contract mentioned in said charge by the court is contrary to the terms, true intent and meaning thereof, and against the law, and that under said charge the jury are authorized to find a compliance with said provisions from a violation thereof by defendant.

Which objections were by the court overruled, and the jury so charged as last aforesaid; to which action of the court in overruling said objections and in so charging the jury plaintiffs then and there duly excepted, and still except.

The court charged the jury then and there in said charge against plaintiffs' objections, as follows:

Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care, under the circumstances testified to, you are the judge of.

127 If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to plaintiffs. It was suggested in argument and shown that more or less of Bilby's own cattle were running with and taken care of the same as the Teal cattle. This testimony must be considered with reference to the condition of the cattle. Strong cattle may get along and do well with treatment under which weaker would suffer. The distinction here drawn has special application to the watering of some of the cattle.

To which action of the court in giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that the contract read in evidence prescribed the manner in which the defendant was to take care of the cattle of plaintiffs; that the matter in controversy was whether he had complied with his contract, and was not a question of "reasonable care" on his behalf, and that the charge complained of authorized the jury to find such compliance on the part of the defendant from reasonable care of said cattle by defendant, and also to find what would be reasonable care under the evidence, thus submitting to the jury an issue not made by the pleadings and the evidence, and said charge is otherwise incompetent and erroneous, which objections were by the court overruled, and the jury so charged as last aforesaid. To which action of the court in overruling said objections and in giving to the
128 jury said charge so last objected to plaintiffs at the time duly excepted, and still except.

Thereupon the court in said charge further instructed the jury against plaintiffs' objections, as follows:

Bilby, under the written contract, was to preserve the hides of cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve all the hides of all the cattle which died, and unless he has done so he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived. There is testimony showing the number of hides preserved by Bilby and as to an agreement with plaintiff Coleman, waiving the preservation of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect and carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made as testified to if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract when the hides of cattle which had died should be counted, and the reasonable con-
129 struction thereupon is that the hides preserved should be counted at a time and with a view of making the hides themselves available for use or sale.

To which action of the court in so giving to the jury said charge last objected to, plaintiffs' at the time then and there objected, for the reason that it was assumed in said charge, as a matter proven by the testimony, that the defendant had preserved the hides of a number of the cattle which had died, and that plaintiffs had waived the preservation of a number of said hides, and that this was a compliance with the terms of said contract stated in the said charge, where as there was evidence tending to prove the contrary, and the question of such preservation and waiver should have been left to the jury to find from the evidence; that the construction of said terms of said contract is erroneous in this, that thereby said hides should be preserved until the time limited by the contract for the return

of the cattle as claimed by plaintiffs, as shown by the evidence, and said charge is otherwise erroneous.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in so giving to the jury the charge so objected to, plaintiffs then and there duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

130 A contract is claimed by Bilby to have been made changing some features of the existing written contract. Bilby affirms the change, Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change; to whom he, Bilby, repeats the agreement in the presence of Coleman, and the witness testifies to the change in court.

To which action of the court in then and there giving to the jury said charge last objected to, plaintiffs at the time then and there objected, for the reason that said charge assumed as facts proven by the evidence that defendant repeated the change of the contract to a witness, that said witness was unimpeached and testified to said change in court, when there was evidence in the cause tending to prove that no such change had ever been made, and that said issue should have been submitted to the jury, and the credibility of each and every witness and the weight and effect of the testimony of each testifying in that regard should have been left to the jury to determine on all the evidence in the case. Said charge is otherwise erroneous.

Which objections were, by the court, then and there overruled, and the jury so charged as last aforesaid; to which action of the court in overruling said objections, and each of them, and in so giving to the jury the charge so objected to, plaintiffs thereupon at the time duly excepted and still except.

131 The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action; yet you are a rascal, and therefore I am entitled to recover a judgment, and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony.

To which action of the court in so giving to the jury said charge last objected to, plaintiffs at the time objected, for the reason that there was no testimony in the case to which said charge, or any part thereof, was applicable, and the same was misleading and prejudicial to plaintiffs and their case, as made upon the evidence, and was not warranted by the evidence.

Which objections were by the court then and there refused, and the jury so charged as last aforesaid; to which action of the court in so giving to the jury said charge so objected to, plaintiffs thereupon at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objection as follows:

Now, if you shall find from the testimony and under the instructions of the court that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first, the replevin, suit for the
132 plaintiffs and assess damages in their, plaintiffs', favor sufficient to cover losses incurred by being deprived of the possession of the cattle from the first day in December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.

But if, on the other hand, you shall find from the testimony, and under the instructions as given you by the court, that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case you are instructed to find the issue in the replevin case for the defendant and assess his damages in an amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Dawsonville from the 2nd day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin.

To which action of the court in so giving to the jury said charge so objected to, plaintiffs then and there objected for the reason that plaintiffs' right of recovery is erroneously stated; that the damages sustained by them, as shown by the evidence, is not correctly given; that the jury are restricted to finding damages in value to the cattle fed and cared for by defendant, and are not required to take into consideration the damages to plaintiffs from the loss, by
133 death or otherwise, of any of the said cattle lost or not delivered to plaintiffs through the failure of defendant to comply with his contract, or through his wrongful failure to make said cattle increase in weight to the extent of his said agreement; that defendant's right of recovery is erroneously given, and his measure of damages not correctly stated; the jury are authorized to find for defendant, if they find he is entitled to anything for the care and feed of the cattle, without deducting the damages plaintiffs may have sustained by reason of the breaches of his contract as above stated, except such as plaintiffs may have sustained by reason of defendants damaging said cattle in value by caring for and feeding them. Said charge is otherwise erroneous and misleading.

Which objections were by the court overruled, and the jury charged as last aforesaid; to which action of the court in so giving to the jury said charge objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections, as follows:

In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possesslon of the cattle and the damage as stated. The determination of the amonnt of damages sustained by one or the other of the parties as to the treatment and care of the cattle, is the subject-matter in controversy in the
134 second suit—the suit for damages on the contract.

To which action of the court in giving to the jury said

charge so objected to, plaintiffs at the time objected, because the jury, in determining the right of possession of the cattle replevined in the replevin suit, were restricted from taking into consideration the damage sustained by plaintiffs by the failure of defendant to comply with their contract under which he received the 1,500 cattle, to feed and care for said cattle so received, and from the damage the plaintiffs may have shown by the evidence they had sustained by reason of the loss of any of said cattle, or the wrongful acts of defendant, and that the said charge is otherwise erroneous and misleading.

Which objections were, by the court, overruled ane the jury so charged as aforesaid. To which action of the court in so giving to the jury said charge so objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections, as follows:

Whatever value you fix on the cattle must be fixed with reference to the value of the cattle then, on the 1st day of December, 1881, at Dawsonville.

To which charge so objected to, plaintiffs at the time objected for the reason that there was testimony offered and in evidence tending
to prove that there was no full market value for said eattle at
135 Dawsonville, on December 1st, 1881, and that the nearest
general market for said cattle was Chicago, Ills., and that the jury should have been permited to determine from the evidence whether said cattle of the weight, either as fixed by the contract or as actually shown by the cattle weighed, could have found a market at Dawsonville, on said 1st day of December, 1881, or have been sold there that day by plaintiffs without unreasonable loss.

Which objections were, by the court, overruled and the jury so charged as last aforesaid.

To which action of the court in overruling said objections and in so charging the jury, said charge so objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections, as follows:

Under the written contract the plaintiffs are entitled to the hides of cattle which unavoidable died, unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them. There is no proof before you as to the value of the hides, and as, in order to recover their value the plaintiffs would have to show it, the hides seem to be out of the question, even if defendant's tender was invalid. The foregoing is the claim of plaintiffs for damages, and they will be as-
136 certained by you under the evidence and the instructions of the court as given you in the manner stated, if the written contract has not been modified or changed.

To which charge so objected to plaintiffs at the time objected, for the reason that it was contrary to the evidence in the case, and that irrespective of the value of the hides of the dead cattle, plaintiffs were entitled under their contract to have them preserved by defendant and tendered to them to enable plaintiffs to ascertain the

number of said cattle that had so died, and the cause of such death, and that said charge is otherwise erroneous and misleading.

Which objections were by the court overruled, and the jury so charged as last aforesaid. To which action of the court in so giving to the jury said charge so objected to, plaintiffs then and there duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

I desire to modify the instructions regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant had in the cattle.

You are further instructed that if you find the issue in 409, the damage suit, for the defendant, you will merely say so in your verdict.

137 To which action of the court in so giving to the jury said charge so objected to, plaintiffs at the time objected, for the reason that the jury are not instructed as to what portion of the entire charge of said court is modified or changed or withdrawn from their consideration by the charge last given, because said charge is contradictory, erroneous, and misleading; because the jury are not instructed in the law as to their finding of the issue in favor of defendant, or in determining whether defendant has any interest in said cattle, or the amount of said interest, and are not instructed in said charge as to what former parts of the entire charge of the court are to be regarded by the jury in their finding the issue in said suit, or in determining the value of the interest of defendant in said cattle, or in determining whether defendant had any interest therein, and said charge so last objected to is otherwise erroneous, misleading, and prejudicial to plaintiffs.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in overruling said objections and in so giving to the jury said charge so objected to, plaintiffs then and there duly excepted, and still except.

138 Thereupon, and on the 2nd day of January, A. D. 1883, and at the said October term of said court, the jury returned the following verdict in open court, which verdict of the jury is in words and figures as follows, to wit:

"We, the jury, find the issues for the defendant.

"W. W. RIGGS, *Foreman.*"

And thereupon, on the 3rd day of January, 1883, the court rendered judgment in favor of said defendant according to said verdict. To which action of the court, in rendering judgment on the verdict, plaintiffs at the time duly excepted and still except.

And afterwards, on the 3rd day of January, A. D. 1883, and at said October term, 1882, of said court, and within four days after the rendition of said verdict, plaintiffs duly filed in said court their mo-

tion to set aside the verdict of the jury herein, and for a new trial in said cause, which said motion is in words and figures as follows, to wit:

In the U. S. Circuit Court, Western Division of the Western Dist. of Mo.

JOSEPH TEAL & Co. *vs.* JOHN S. BILBY. } No. 409.

Plaintiffs move the court to set aside the verdict and for a new trial, because:

139 1. The court erred in excluding competent and relevant testimony offered by plaintiffs.

2. The court erred in admitting incompetent and irrelevant testimony on behalf of def't.

3. The verdict was against the law and evidence.

4. The court erred in charging the jury as to the law of this case.

5. Matters were submit-ed to the jury and passed on by them which were not presented in the pleadings.

6. Under the pleadings and evidence the verdict should have been for plaintiffs.

L. H. WATERS &
EDWARDS & RAMSEY, *P. A.*

And afterwards, at the same October term of said court, and on the 25th day of January, 1883, said motion to set aside the verdict of the jury, and for a new trial in said cause, was taken up by the court and argued by counsel for plaintiffs and the defendant; and afterwards, to wit, at the same term, and on the 5th day of February, 1883, said motion for a new trial and to set aside the verdict of the jury in said cause were by the court overruled.

To which action of the court in overruling said motion, and in refusing to set aside said verdict of the jury, and to grant plaintiffs a new trial in said cause, plaintiffs at the time then and there

140 duly excepted and still except.

And inasmuch as the said several matters so produced and given in evidence for the defendant, and by the plaintiff objected to, and plaintiffs' exceptions thereto made at the time and insisted upon, and the said several matters so produced and offered in evidence by plaintiffs and rejected by the court, and plaintiffs' exceptions thereto made at the time and insisted upon, and the several rulings of said court thereon, and the said instructions to the jury prayed for by plaintiffs and refused by the court, against plaintiffs' objections, and their exceptions thereto, made at the time and insisted upon; and the said instructions to the jury given by the court against plaintiffs' objections, and their said exceptions thereto, made at the time and insisted upon; and the several other matters herein objected to, and the plaintiffs' exceptions thereto, made and insisted upon at the time, do not appear by the record of said cause, or of said verdict, or the judgment herein, plaintiffs afterwards, to wit, on

the — day of April, A. D. 1883, and at and during said October term, 1882, of said court, upon leave and order of said court first had and obtained, and according to the statute in such case made and provided, duly presented in said court this their said bill of exceptions in said cause, and prayed said court to allow said bill of exceptions, and then and there to sign and seal the same, and to make
141 said bill of exceptions a part of the record in said cause, which, on said day aforesaid, and at said October term, 1883, of said court, was done accordingly.

A. KREKEL, [SEAL.]
Judge of said Court.

I sign this second bill of exceptions, not because I deem it necessary, but it is insisted by plaintiffs' attorney that unless such second bill of exceptions is signed injury might result to them in the hearing of the cases.

A. KREKEL, *Judge.*

142 And afterwards, to wit, at said term, and on the 18th day of June, in the year aforesaid, the following further proceedings were had and entered of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the plaintiffs, by their attorneys, Botsford & Williams, and present to the court a writ of error to reverse the judgment in the above-entitled cause, a citation to the defendant to appear at a Supreme Court of the United States, on the second Monday of October next, and a bond in the sum one hundred dollars for the prosecution of said writ to effect, and to answer all damages and costs; and thereupon, the premises having been considered, the court doth allow said writ, and said citation is signed by the court, and said bond is approved and ordered to be made a part of the record, which is accordingly done.

And said bond is in words and figures as follows, to wit:

Know all men by these presents, that we, J. Teal & Co. and Henry Coleman, as principals and as sureties, are held and firmly bound unto John S. Bilby in the full and just sum of one hundred dollars (100.00), to be paid to the said John S. Bilby.
143 To which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the October term, A. D. 1882, of the circuit court of the United States for the western district of Missouri, western division, in the suit depending in said court between Joseph Teal, Henry Coleman, John Y. Todd, and John Storrs, copartners, trading and doing business under the firm name of J. Teal & Co., plaintiffs, and John S. Bilby, defendant, judgment was rendered against the said Joseph Teal, Henry Coleman, John Y. Todd, and Joseph S. Storrs, plaintiffs

aforesaid, and the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs having obtained a writ of error of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John S. Bilby, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington city, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph Teal, Henry Coleman, John Y. Todd, and Joseph S. Storrs shall prosecute said writ to effect and answer all damages and costs, if they fail to make good their plea, then the above
144 obligation to be void; else to remain in full force and virtue.

J. TEAL & CO. [SEAL.]
HENRY COLEMAN. [SEAL.]
A. A. WHIPPLE. [SEAL.]

Approved by—
A. KREKEL, *Judge*

UNITED STATES OF AMERICA, *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the western division of the western district of Missouri, do hereby certify, in obedience to the writ of error attached hereto, that the foregoing is a true and complete transcript of the record and proceedings, with all things concerning the same, in the case of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs against John S. Bilby, as fully as the same remains on file and of record in my office.

Witness my hand, as clerk, and the seal of said court. Done at my office in Kansas City, in said division and district, this 25th day of July, A. D. 1884.

[SEAL.]

H. C. GEISBERG, *Clerk*,
By WARREN WATSON,
Deputy Clerk.

Endorsed on cover: W. Missouri C. C. U. S. No. 970. Joseph Teal, Henry Coleman, John Y. Todd, & John S. Storrs, partners as J. Teal & Company, plaintiffs in error, *vs.* John S. Bilby. Filed 29th September, 1884.

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141 said bill of exceptions a part of the record in said cause, which, on said day aforesaid, and at said October term, 1883, of said court, was done accordingly.

A. KREKEL, [SEAL.]
Judge of said Court.

I sign this second bill of exceptions, not because I deem it necessary, but it is insisted by plaintiffs' attorney that unless such second bill of exceptions is signed injury might result to them in the hearing of the cases.

A. KREKEL, *Judge.*

142 And afterwards, to wit, at said term, and on the 18th day of June, in the year aforesaid, the following further proceedings were had and entered of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the plaintiffs, by their attorneys, Botsford & Williams, and present to the court a writ of error to reverse the judgment in the above-entitled cause, a citation to the defendant to appear at a Supreme Court of the United States, on the second Monday of October next, and a bond in the sum one hundred dollars for the prosecution of said writ to effect, and to answer all damages and costs; and thereupon, the premises having been considered, the court doth allow said writ, and said citation is signed by the court, and said bond is approved and ordered to be made a part of the record, which is accordingly done.

And said bond is in words and figures as follows, to wit:

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aforesaid, and the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs having obtained a writ of error of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John S. Bilby, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington city, D. C., on the second Monday of October next:

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144 obligation to be void; else to remain in full force and virtue.

J. TEAL & CO. [SEAL.]
HENRY COLEMAN. [SEAL.]
A. A. WHIPPLE. [SEAL.]

Approved by—
A. KREKEL, *Judge*

UNITED STATES OF AMERICA, *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the western division of the western district of Missouri, do hereby certify, in obedience to the writ of error attached hereto, that the foregoing is a true and complete transcript of the record and proceedings, with all things concerning the same, in the case of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs against John S. Bilby, as fully as the same remains on file and of record in my office.

Witness my hand, as clerk, and the seal of said court. Done at my office in Kansas City, in said division and district, this 25th day of July, A. D. 1884.

[SEAL.]

H. C. GEISBERG, *Clerk*,
By WARREN WATSON,
Deputy Clerk.

Endorsed on cover: W. Missouri C. C. U. S. No. 970. Joseph Teal, Henry Coleman, John Y. Todd, & John S. Storrs, partners as J. Teal & Company, plaintiffs in error, *vs.* John S. Bilby. Filed 29th September, 1884.